COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF THE UNIVERSITY OF PITTSBURGH	:	Case No. PERA-R-17-355-W;
	:	PERA-C-19-95-W
	:	

BRIEF OF THE UNIVERSITY OF PITTSBURGH IN SUPPORT OF ITS EXCEPTIONS TO THE PROPOSED DECISION AND ORDER

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I. INTRODUCTION

Actions have consequences. Decisions are not made in a vacuum. The Proposed Decision and Order ("PDO") setting aside the results of an election impacting more than 2,000 graduate students at the University of Pittsburgh ("University" or "Pitt") is contrary to well-established law and sets a dangerous precedent, which has the potential to negatively impact future elections throughout the Commonwealth, as well as the future of the University and its graduate students. Out of the twelve allegations levied by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the "Union"), against the University, the Hearing Examiner found that three statements were unfair labor practices and that each warranted setting aside the votes cast by more than 1,500 graduate students during a four-day election conducted by the Pennsylvania Labor Relations Board ("PLRB").[1] The Hearing Examiner's findings and conclusions in this regard are contrary to well-established law and contrary to substantial evidence in the record and must be set aside.

Contrary to the PDO's unsupported findings, the two complained-of statements that were posted on the University's website, among scores of others, were not a substantial departure from the truth. Rather, one was a chart summarizing what a union can and cannot demand to bargain under Pennsylvania law as it relates to graduate students whose academic appointments are closely related to and, in many cases, integrated with, their academic

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[1] The Union also alleged numerous instances of misconduct by the PLRB officials in conducting the election, including racial profiling in asking voters for identification. Each of these claims, along with the majority of the claims raised by the Union against the University, were correctly rejected by the Hearing Examiner as being contrary to Pennsylvania law and the record.

programs.[2] Not only was that chart similar in content to several other communications which were either not challenged by the Union or found permissible by the Hearing Examiner, neither the Union nor the Hearing Examiner has pointed to any legal authority demonstrating that any of the statements in that chart were inaccurate under Pennsylvania law. That is not surprising given the statements themselves. For example, there cannot be a serious question that PERA does not make decisions over which students will be admitted by the University into its graduate programs, a mandatory subject of bargaining. Yet, the Hearing Examiner, without citation to authority, claims that listing "admissions decisions," among others, under the heading of things that the "Union Cannot Bargain Over" is "a substantial departure from the truth, not carefully drawn, and not based on objective fact." (PDO at 25-26). This finding, along with the PDO's similar conclusions about other statements in the chart, is contrary to the law and the facts and must be set aside.[3]

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2 The University continues to assert that the graduate students at issue are not employees under PERA and that the March 7, 2019 Order Directing Submission of Eligibility List ("ODSEL") was contrary to the law and the substantial evidence in the record of those proceedings (PERA-R-17-355-W). However, PLRB regulations did not permit the University to challenge that decision through the filing of exceptions when it was issued and do not permit the University to raise those issues in these exceptions, which are limited to challenging the September 18, 2019 PDO. Notably, the National Labor Relations Board ("NLRB"), on whose reasoning in the ODSEL ultimately rests, has proposed a regulation to make clear that graduate students whose "work" is related to their academic programs are not employees within the meaning of the National Labor Relations Act ("NLRA") because the relationship is primarily educational, not economic in nature. 84 FR 49691. The same is true here.

3 Ironically, in the ODSEL, the Hearing Examiner found that academic appointments were employment that could be separated from students' academic programs, and thus, students could be "employes" within the meaning of the Pennsylvania Public Employe Relations Act. (PLRB -1 at 13, 19). His finding that it was improper for the University to suggest that academic decisions could not be bargained by a union is contrary to the ODSEL, and would have the effect of turning Pennsylvania law on its head in a manner that not even the Union has ever proposed.

The Hearing Examiner's conclusions about the second statement – a single sentence explaining the concept of direct dealing in a two paragraph answer that comes within a Frequently Asked Questions page with more than forty questions and answers – are similarly flawed. Once again, the allegedly objectionable statement was similar to several other communications that were either not challenged by the Union or found appropriate by the Hearing Examiner. And, once again, the Hearing Examiner cited no authority for his finding that the statement – which merely explained that, if there were a union, the University could not deal directly with students about the terms of their academic appointments (which the PDO calls "job placements"), and that they could lose individual decision-making power about those appointments. (PDO at 23-24). This statement is not an unfair labor practice and the Hearing Examiner's decision to the contrary must be set aside.

The final statement the Hearing Examiner found an unfair labor practice was an email sent by a Department Chair without the knowledge of the University administration on the morning of the third day of the election to approximately 46 students in his department, encouraging them to vote and providing links to information offered by both sides. The allegedly objectionable statement, in a message that is not otherwise alleged to be coercive in its content, refers to this individual faculty member being surprised at the small number of students in the School of Engineering that had voted so far. That is it. There was no bias. No threats. No statement that he know who voted or how they voted, or that he cared how anyone voted. It was a get out to vote, balanced message. That statement is not coercive and does not warrant an unfair labor practice finding.

In finding unfair labor practices, the Hearing Examiner applied the wrong standard – failing to look at the communications in context. In addition, he applied the wrong

standards in determining that a new election is warranted. He set a dangerous precedent by finding that two of the communications posted on a website made them more coercive for the sole reason that they were on a webpage, and deprived the Union of the opportunity to respond. The contrary is true. The fact that they were on a website that voters had to first actively choose to navigate to, and then actively choose to navigate to the page containing the allegedly improper statements among many different pages on the site to which the Union has not objected, then actively choose to navigate to the section containing the allegedly improper statements, and then actively choose to select and read the particular statements, out of the approximately forty FAQ responses on that one page, makes them far less capable of being coercive and gave the Union ample opportunity to respond.[4] In fact, the Hearing Examiner expressly found in the Findings of Fact that the Union did have the opportunity to respond, but then reached a conclusion contrary to his own factual finding. Nevertheless, the Hearing Examiner's findings are a slippery slope in today's modern era where the majority of communications in any campaign take place electronically and the use of webpages and social media sites to communicate with voters are common by both employers and unions. Finally, the Hearing Examiner applied the wrong standard in asking the University to prove a negative – that the alleged unfair labor practices did not impact the election. Even if that were the standard, the Hearing Examiner erred in finding that the University met that showing. For all these reasons, and those set forth below, the PDO must be set aside and the election results certified.

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[4] Notably, the record is bereft of evidence that anyone other than the single student who introduced the exhibit ever viewed either of the statements the Hearing Examiner found objectionable.

II. STATEMENT OF FACTS

A. Procedural History

On December 15, 2017, the Union filed a Petition for Representation in case PERA-R-17-355-W ("Petition")(PDO Finding of Fact No. 3). The Petition seeks to include all salaried and hourly graduate employee teaching assistants, teaching fellows, graduate student assistants and graduate student researchers employed by the University at its Pittsburgh, Pennsylvania campus. This was later amended to include the foregoing individuals at all campuses, and excluding all other employees, including trainees, unpaid graduate students, faculty, staff, office clerical employees, non-professional employees, guards, and supervisors as defined in PERA. Hearings were held in fall 2018, after which Hearing Examiner Stephen Helmerich issued the ODSEL on March 7, 2019. (PLRB-1)(PDO Finding of Fact No. 4). The University provided the eligibility list on March 18, 2019, and the PLRB issued an Order of Election on March 29, 2019 setting an election on April 15-18, 2019. (PLRB-2)(PDO Findings of Fact No. 5, 7). When the ballots were opened and canvassed, numerous ballots were challenged, but the Union ultimately lost the election by 37 votes. (PLRB-2)(PDO Finding of Fact No. 30). After the ballots were canvassed, on May 2, 2019, the Union filed objections to the PLRB's conduct of the election, and charges of unfair labor practices against the University. ("Objections" and "ULP," respectively). The Hearing Examiner held hearings on both matters on May 14 and May 15, 2019. (PDO at 1). After the hearings, the Union filed a post-hearing brief on July 12, 2019, and the University filed a post hearing brief on August 12, 2019. (*Id.*). The Union filed a reply brief on August 26, 2019. (*Id.*). The Hearing Examiner issued his PDO on September 18, 2019.

B. Conduct of the Election

The PLRB conducted an in-person election at the University from Monday, April 15 through Thursday, April 18, 2019, from 9:00 am to 5:00 pm each day. (PLRB-2). The polling place was Posvar Hall on April 15 and 16, and the O'Hara Student Center on April 17 and 18. (*Id.*). The PLRB administrative officer assigned to oversee the election was Dennis Bachy. (Tr. 22). Mr. Bachy is in charge of the Pittsburgh office of the PLRB, and has been administering elections for the PLRB since spring of 2003, and has overseen about 800-900 elections during that time, 95% of which were in person. (Tr. 21, 65, 66). There is no dispute that he is well acquainted with the PLRB election procedures.

On April 15, about fifteen minutes before the polling place opened at 9:00 am, Mr. Bachy held a pre-election briefing. (Tr. 26, 273, 304)(PDO Finding of Fact No. 8). During that meeting, Mr. Bachy explained how the voting would proceed, and met with the watchers for both parties.[5] (Tr. 26)(PDO Finding of Fact No. 8). Stephanie Hoogendoorn, on behalf of the University, and Jeff Cech and Brad Manzolillo, on behalf of the Union, were also present during the briefing. (Tr. 28, 319). The other PLRB agents present during that pre-election briefing were Joe Gralewski, Rebecca McClincy and Kathy Owens. (Tr. 29)(PDO Finding of Fact No. 9).

The PLRB representatives clarified that the role of the election observer was to maintain the fairness of the election and identify voters, among other responsibilities. (Tr. 72, 275; E-1). Upon meeting the election watchers for the University, the Union immediately raised concerns about the watchers being supervisors. (Tr. 26-27). The University's watchers were

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[5] University watcher Peggy King was not present for that briefing, but was updated on what was discussed. (Tr. 309).

Peggy King, Senior Assistant to the Provost, Amanda Brodish, Director of Data Analytics and Pathways for Student Success, Amy Tuttle, Senior Assistant to the Provost, and Victoria Lancaster, Director of Faculty Actions. (Tr. 47, 273, 287, 303, 309). Mr. Bachy asked further questions about the job responsibilities of the University watchers to determine whether they were appropriate. (Tr. 27, 274, 319). Through his questioning, Mr. Bachy confirmed that none of the University watchers supervised graduate students, and instead were administrative employees in their respective offices, none of which were related to graduate student affairs. (Tr. 27, 274, 288, 304, 309)(PDO Findings of Fact No. 9, 15-20). Mr. Bachy concluded that these employees did not have jobs related to graduate students, and that the graduate students would not recognize them so there would be no risk of coercion of voters. (Tr. 75). Therefore, he decided to allow them as watchers. (Tr. 27, 74-75). Because he was comfortable with the selected election watchers for the University, he did not ask Ms. Hoogendoorn to select different watchers. (Tr. 73, 319). Nor did he notify counsel for the University of any concerns about the identity of the watchers. (Tr. 74). If Mr. Bachy had expressed any concerns with the identity of the watchers, Ms. Hoogendoorn would have found replacements quickly that morning. (Tr. 320).

The election proceeded as planned. In order to identify themselves and their role in the election, the watchers for both sides wore badges, stating "election observer," without identifying the party for whom they were watching. (Tr. 55, 95, 109, 155-156). As each individual came in to vote, the University watchers compared the name of the voter to the University's list of eligible voters to ensure that all eligible voters had the opportunity to vote and that only eligible voters voted. (Tr. 48, 279)(PDO Finding of Fact No. 21). The Union raised concerns about the University's keeping of a list to Mr. Bachy, but Mr. Bachy explained

that the PLRB does not have a rule against this. (Tr. 38, 55, 280, 283)(PDO Findings of Fact No. 23, 24). Indeed, Mr. Bachy thought the Union might decide to start tracking voters at any time, as both sides are permitted to keep a list, and it is common for both sides to do so. (Tr. 49, 55, 79)(PDO Finding of Fact No. 23). In fact, PLRB employee, Joe Gralewski, advised the University's watchers on how to use their list efficiently. (Tr. 280). At no time did the Union raise concerns with the University about its keeping of a voter list; it only ever raised concerns with the PLRB agent. (PLRB-3B, Tr. 38, 55, 56, 205). Mr. Bachy never conveyed these concerns to any representative of the University during the election. (Tr. 80).

The PLRB followed its normal procedures during this election. (Tr. 31). During the early days of the election, the PLRB agent would ask a voter for her name when she approached the table without asking for identification or taking it if offered. (Tr. 31-32)(PDO Finding of Fact No. 10). The PLRB agent would then look for her name on the official list of voters. (*Id.*). Then, if the agent still could not find her name on the list, the agent would ask for the spelling of her name, or for her identification. (Tr. 31, 67)(PDO Finding of Fact No. 11). Only if the agent still could not find the student's name on the official list would she be sent to the challenge station. (Tr. 32). By Tuesday afternoon, Mr. Bachy decided to ask for identification from every single voter in order to make the voting go faster. (Tr. 32, 294, 310)(PDO Finding of Fact No. 10). Many students preemptively offered their IDs as they approaching the registration table. (Tr. 152, 160, 293). Several times, the University found voters on the list when the PLRB agent was struggling to do so, allowing eligible voters to vote when they otherwise would have been challenged by the PLRB. (Tr. 80, 310-11). PLRB representatives asked the University to be this "second set of eyes" to ensure that all eligible voters could vote without being improperly challenged. (Tr. 282).

All the University watchers, Mr. Bachy, and the Union watchers testified that they did not see an eligible voter leave without voting. (Tr. 88, 135, 161, 176, 215, 297, 306, 311). They further testified that no one objected to presenting their identification in order to vote. (Tr. 86, 176, 212, 297, 311)(PDO Finding of Fact No. 12). Mr. Bachy also testified that in his professional experience, conducting hundreds of elections, no voter appeared intimidated or coerced. (Tr. 38, 61-63).

C. University Communications with Eligible Voters

In the weeks leading up the election, the University sought to educate all eligible voters about the election and the election process, and provide responses to student questions about the possible implications of unionization through emails and webpage postings. (Tr. 337-38; U-2 to U-11, U-14, E-12, E-13, E-15, E-16, E-17, E-19 to E-27). Many of those communications were simply factual, such as providing the election dates and times; others expressed the University's position on graduate student unionization at Pitt.

1. Communications Leading up to the Election

Vice Provost for Graduate Affairs Dr. Nathan Urban drafted and sent a series of emails to all graduate students eligible to vote in the election, and also curated content on the University's webpage about graduate student unionization. (Tr. 336-37)(PDO Finding of Fact No. 35). The emails entered into evidence as exhibits represent most, if not all, of the emails sent to students after the election was ordered, although Dr. Urban estimated that he sent approximately 50 or 60 emails total before the election concluded, including ones sent before the election order was issued. (Tr. 338-39, 363, 432-33). These emails were intended to inform students and engage them in discussions. (Tr. 429-430). Email is the standard form of communication between the University and its graduate students, and this was the main form of communication leading up the election. (Tr. 430).

The University also set up an anonymous online portal to allow graduate students to submit questions. (Tr. 341, 344). The portal was set up by the University communications department, not by Dr. Urban or anyone in his office. (Tr. 353). The University communications department used a commercial service called Wufoo that allowed students to enter text into a box and then press submit, and the message was then sent to a standard Outlook mailbox that Dr. Urban monitored. (Tr. 350-51). Because the University had no way of replying to the inquiring student privately, it used those questions to inform the development of information provided in its emails and webpage postings. (Tr. 345). Dr. Urban received hundreds of questions in a variety of forms in the weeks leading up to the election, including through the Wufoo portal, on index cards at in person forums, through direct emails and in person both at formal events and informal occasions like walking around campus, in line at Starbucks, etc. (Tr. 342-44, 350, 359-60).

Dr. Urban also participated in a number of in-person information sessions leading up to the election, some of which allowed students to submit questions that were provided to him in advance. (Tr. 339-340, 380, 396). At some sessions, students could also submit questions in person, anonymously, on index cards. (Tr. 342; E-8, E-9, E-10, E-11). There were also school specific information sessions, including a session on April 9, 2019 with students from the School of Engineering (U-20, E-3, E-4, PLRB-7), as well as sessions with students from the Chemistry Department (E-14), the Physics Department (E-18), the School of Computing and Information and the Medical School. (Tr. 339, 342-43, 379, 396).

Union representatives also participated in a number of school specific town halls. For example, Union counsel Mr. Manzolillo and Union witness Emily Ackerman both appeared at the School of Engineering information session and separately answered the identical set of

questions to the ones posed to Dr. Urban. (E-3, E-4). Union organizers also appeared at a session sponsored by the Graduate and Professional Student Government ("GPSG") that the University did not attend and spoke at the School of Computing and Information event following Dr. Urban's remarks. (Tr. 385-86).

The University held a graduate student-wide information session on March 26, 2019. (Tr. 341). Dr. Urban sent out a summary email the next day addressing the most frequently asked questions. (Tr. 346, 362; U-2). Dr. Urban sent that email because approximately 70 students attended the session, a small portion of the voter population, and, Dr. Urban logically assumed that the questions that were being asked by students in person and via the Wufoo portal in advance of that session were representative of the questions of the entire group, so he wanted to distribute the University's responses more widely. (Tr. 346, 361).

In response to the oft-asked question, "how would union representation change the graduate student experience," the University replied, in the paragraph challenged by the Union,

> We also believe that students could lose their ability to work directly with their faculty advisors or department on things like stipends, assistantship opportunities, research hours, and accommodations. Such limitations can make it harder for the University to work directly with students and swiftly address each student's unique needs, wants and goals. Another potential concern is that the University may not be able to change individual stipends and benefits to recruit and retain top students.

(U-2). Notably, the Union did not object to the remainder of Dr. Urban's answer to that question. Dr. Urban included this information because students had questions about the impact of unionization on their ability to work directly with a faculty advisor on issues like stipends, work hours and such. (Tr. 348). Dr. Urban received many questions on this topic before March 27 through the anonymous portal (E-5, E-6, E-7), as well as in person at the University-wide

information session, and continued to receive questions thereafter. (E-8, E-9, E-10, E-11; Tr. 360). The Hearing Examiner did not address the Union's objection to U-2 in the PDO [confirm], but found many similar statements to be acceptable. (See PDO at 20-27).

Subsequently, on March 29, 2019, Dr. Urban sent another email to all graduate students to address questions about stipends. (E-9; Tr. 364). The Union objected only to the following paragraph on page three of the six page document:

> Over the last five year, stipend levels for Pitt graduate student TAs have increased by 13.2 percent, which is faster than the rate of inflation (7.4 percent), and more than increases in Pitt faculty and staff salaries during this time period. These stipend increases are also larger than those seen at a number of universities with graduate student unions, such as the University of Michigan, Michigan State University, the University of Illinois, the University of Washington, and others.

(U-3)(PDO Finding of Fact No. 37). This email came within a flurry of other emails in early April, to which the Union did not object. (*See* E-12; E-13). Many of Dr. Urban's emails also included hyper-links to the University's website on this topic, www.gradstudentunionization.pitt.edu, where the University was curating information about collective bargaining basics, FAQs and other viewpoints about unionization. (U-4; *see also* E-24, E-25, E-26). The Hearing Examiner rejected the Union's claim about U-3 finding that "[c]ertainly nothing in this record would support a conclusion that anything in this message is a "substantial departure from the truth." (PDO at 21).

Dr. Urban also sent emails to specific subsets of graduate students who were eligible to vote. (*See, e.g.*, U-18). Many Science, Technology, Engineering and Math ("STEM") students had specific questions about the impact of unionization on research activities and lab work that did not affect students in other fields. (Tr. 371). The Union objected to one only portion of one of Dr. Urban's emails to STEM students, which read:

Your research opportunities and activities could be restricted. At Temple University, graduate student researchers who are in the bargaining unit cannot use any research performed in connection with their assistantship for any "direct academic benefit."

- Under a union, research performed while in the bargaining unit might not count towards academic milestones, including dissertations.
- Under a union, students not in the bargaining unit (e.g. fellows and trainees) might not be eligible to teach or guest lecture in classes for educational experience.
- The union could require you to separate assistantship research from dissertation research. As a result, you may have to perform more research to meet current academic requirements.

(U-18)(PDO Finding of Fact No. 38). Dr. Urban specifically provided the Temple example because Temple is the only other public university in Pennsylvania that has a graduate student union, and thus was most relevant. (Tr. 374)(PDO Finding of Fact No. 39). Notably, the Union never suggested that the description of the union at Temple is inaccurate. The Hearing Examiner rejected the Union's challenge to U-18. (PDO at 22).

Significantly, during a town hall for Engineering students, organized by the Engineering Graduate Student Organization ("EGSO") on April 9, 2019, the Union explicitly stated that forming a union "only impacts your employment relationship at the University, not your relationship as a student" and "the University . . . would not have a legal obligation to bargain with the Union over your student status." (E-4 at 41). Dr. Urban was concerned that the Union's statements did not accurately capture how difficult this kind of a distinction would be in practice, particularly for STEM students where their academic and assistantship research are often intertwined, so he shared his concerns about the practical uncertainties in his email to STEM students. (Tr. 373, 376-77; U-18).

On April 5, 2019, Dr. Urban sent an email to all graduate students to address questions that the University was receiving about what a collective bargaining agreement would

look like and what the impact would be, including on stipend increases during negotiations. (U-5). The Union objected to the following portion of that larger communication:

> **Again: Nothing is guaranteed.**
>
> There is no guarantee that the union will obtain improvements in any area. What we know is that while a contract is being negotiated – which typically takes months or more than a year – under PA law, stipends would be frozen under "status quo" and annual stipend increases would not occur. For reference: The University has increased stipends by more than 13% over the last five years.

(U-5)(PDO Finding of Fact No. 36). The University addressed what happens under PERA on the issue of status quo during first contract negotiations because there was apparent confusion, and students were telling the University that the Union was providing an answer that was contrary to the University's understanding of the law. (Tr. 381-82). This email linked to the University's website on unionization where the University provided a legal citation for its statements in the "Fact Check" section. (U-14). The Union's contrary statements on this issue were confirmed during the EGSO event when the Union's attorney, Mr. Manzolillo, gave a contrary statement of the law, citing a much older case that did not address status quo during first contract negotiations, as the case cited by the University did. (E-4 at 30). The Hearing Examiner rejected the Union's challenge to U-5 and U-14. (PDO at 20, 27).

In the days immediately leading up to the election, the University continued to provide information about the election process and generally encourage eligible students to vote. (Tr. 389; E-15, E-16). In conjunction with those efforts, the University continued to reassure international graduate students that their immigration status would not be affected by a union, and that the University had many resources available to all of its graduate students, including those from abroad. (E-17). The Union did not object to these emails.

The University also continued to educate students on the collective bargaining process. For example, on April 10, 2019, the day after the information session with engineering graduate students, Dr. Urban sent an email to all eligible graduate students that addressed what can be bargained under Pennsylvania law, in response to persistent questions from students about this issue, including questions asking for specifics. (U-6; Tr. 394-95). The Union objected to the following part of that communication:

> Under Pennsylvania law, there are only three issues that the University and union can bargain over:
>
> - Stipends,
> - Benefits,
> - And "working conditions."
>
> That's it.
>
> Despite claims you may have heard, the union cannot bargain over the University's budget, programs offered, admissions decisions, selection of students for academic appointments, how many academic appointments are offered, or class assignments.
>
> In addition, the Pennsylvania Labor Relations Board and Pennsylvania courts have never defined what's covered under "working conditions" for graduate students who teach and conduct research as part of their academic experience. We don't know how a union could affect research hours or other core components of the educational experience, because this is uncharted territory.

(U-6)(PDO Finding of Fact No. 40). Dr. Urban received numerous questions at the town hall and thereafter about what things a union could influence. (*See generally*, E-4; Tr. 348, 362-63, 394-95). The Hearing Examiner did not find that U-6 is an unfair labor practice. (PDO at 26-27).

Dr. Urban continued to offer updates and clarifications as he fielded more student questions and received more information about the Union's misrepresentations. (Tr. 399). He sent out another email on April 11, 2019, which specifically noted that the Union has never

represented graduate students in the United States. (E-19). He persisted in his efforts to encourage students to participate in the election, and informed them of shuttle services. (E-20). Finally, on the day before the election, Provost Dr. Ann Cudd sent out an email summarizing the University's dedication to its graduate students and encouraging informed voting. (U-7). The Union did not object to the text of any of these emails.

2. Communications during the Election

Once the elections began, the University sent out emails encouraging eligible graduate students to vote and make their voices heard. (U-8, U-9). Dr. Urban also sent out an email specifically to STEM graduate students on April 17, 2019. (E-21). This email included a hyper-link to a list of student concerns about the Union, because a number of STEM students told Dr. Urban that they felt their concerns about the Union had not been heard. (Tr. 402). The Union did not object to any portion of the text of these communications.

On the last day of the election, Dr. Urban encouraged students to vote and shared some final thoughts on unionization through hyperlinks to the University's unionization website. (E-22, U-10; *see also* E-24, E-25, E-26). He also sent an email specifically to international graduate students to reaffirm the University's support of their studies and encourage them to vote. (E-23). Again, the Union did not object to the text of any of these emails.

3. University's Unionization Website

Almost every email Dr. Urban sent included hyperlinks to the University's unionization website, in order to provide graduate students a fuller picture of the issues that he touched upon in his emails. (PDO Finding of Fact No. 41). There is no evidence in the record that any eligible voter, except Casey Madden, a union election watcher, opened and read the emails from Dr. Urban, let alone clicked on those hyperlinks before the election. (Tr. 122-24).

One webpage compiled a list of the University's resources for graduate students, including information on health and wellness, academic resources, and career preparation. (E-24; Tr. 408). Another webpage reiterated the University's commitment to its graduate students and the actions it had taken on behalf of its graduate students. (E-25; Tr. 408). Yet another webpage provided links to outside sources about unionization activities in the broader graduate student context, including a link to the Union's website and that of the GPSG. (E-26; Tr. 408). All of these webpages were posted and maintained before the election, including the link to the Union's website, and the Union did not object to the content on any of these pages.

One page of the website, which was posted and maintained well before the election, is titled "collective bargaining basics," and includes questions and answers to common questions about collective bargaining. (U-11). The Union objected to one entry on that webpage - a chart about issues that are eligible for bargaining:

Union Can Bargain Over:	Union Cannot Bargain Over:
• Stipends • Benefits • Working conditions* *The PLRB and Pennsylvania courts have never defined this for graduate students whose teaching and research are part of their academic training	• Budget and allocation of funds • Technology use • Programs offered • Management rights • Selection of students for academic appointments • Direction of students with academic appointments • Standards of service • Admissions decisions • Academic requirements and academic decisions • The number of academic appointments • Programmatic decisions

(U-11). (PDO Finding of Fact No. 43). The Hearing Examiner found this chart was an unfair labor practice. (PDO at 28).

Another page of the website, which was also posted and maintained before the election, is called "Fact Check." (U-14; Tr. 412). The Union objected to one paragraph of the many on this webpage that responded to claims being made by the Union that the University considered inaccurate:

> **A contract is a contract.** Most graduate student union contracts (like Temple (http://www.tugsa.org/wordpress/wp-content/uploads/2018-2022-TUGSA-Collective-Bargaining-Agreement.pdf) and U Washington (https://hr.uw.edu/labor/wp-content/uploads/sites/8/2018/10/UAW-UW-18-21-CBA-Final.pdf)) specific a maximum number of hours that students can work per week. Contract terms can't be circumvented by you or the University, despite what the Steelworkers have claimed. If you tried to work more than the delineated hours, the University would have to stop you or breach the agreement and potentially face consequences, full stop.

(U-14)(PDO Finding of Fact No. 49). The Hearing Examiner rejected the Union's claim that U-14 was an unfair labor practice. (PDO at 28).

Finally, the website included a page called "Frequently Asked Questions" which contained more than 40 questions and answers over 11 print pages. (E-27)(PDO Finding of Fact No. 44). The University provided a full copy of the FAQ questions and answers for context, whereas the Union only provided the answers to certain questions to which it objected. (Tr. 413; *Compare* U-12, U-13, U-15, U-16 with E-27). The Union objected to the following five answers in the FAQ:

> **What can be bargained?**
>
> A union can bargain over stipends, hours and working conditions.
>
> Unions *cannot* bargain over:
>
> - Management rights, including
> - The selection and direction of personnel
> - Standards of service
> - Budget
> - Technology use

- Employee counts; and,
- Programs offered.

(U-12) (PDO Finding of Fact No. 44).

Could a union impact my ability to work with my faculty advisor to tailor my graduate school experience?

Yes. Unions negotiate contract on behalf of the entire bargaining unit – not on behalf of its individual members. A union may limit the ability of the University and its faculty to work directly with graduate students and agree upon individualized conditions, accommodations or experiences that are the hallmarks of a graduate education.

(U-12) (PDO Finding of Fact No. 45).

Will a union give students more say in how decisions about academic appointments are made?

Currently, students can work with their faculty advisor and their program to make decisions about their own academic appointments.

With a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments. The union has the exclusive right to speak on the behalf of graduate students when it comes to academic appointments and assignments could be determined in ways that are less adaptive to individual student needs.

It's useful to note that the Union cannot negotiate how many academic appointments the University offers.

(U-13) (PDO Finding of Fact No. 46).

Could a union result in students having to keep track of their hours?

Yes, a CBA could require students to track their hours, including lab hours. Students may also be asked to distinguish time spent on activities for an academic appointment versus academic research. For many graduate students, especially those in STEM fields, discerning between these two types of academic hours is not always possible.

(U-15) (PDO Finding of Fact No. 47).

> **Will a union given me the right to decide what tasks are part of my academic appointment?**
>
> A union might seek to bargain over assignments, but the courts may have to decide whether they would have the ability to do so. The graduate union at Temple University does not have the right to bargain over assignments. Even the unionized faculty at Temple University do not have a say in how their classes are assigned.

(U-16, U-17)(PDO Finding of Fact No. 48). Notably, the Union highlighted a few responses, when there were dozens of questions and answers, links and resources. (*Compare* U-11 through U-17 with E-27). The Hearing Examiner found that one sentence of U-11 was an unfair labor practice, rejecting the Union's claim regarding all of the other statements. (PDO at 23, 27-28).

All of these responses on the website were offered in reply to student questions. (Tr. 338, 362, 363, 377; E-5, E-6, E-7, E-8). Graduate students clamored for this information and Dr. Urban and the University sought to meet that need. (*Id.*) Moreover, this website and the handful of statements about which the Union complained were maintained before and during the election, so the Union had plenty of time to see, analyze and rebut any statements with which it disagreed, and it did so through its direct communications with voters. (Tr. 164-65, 267, 337-38, 409, 412).

4. Communications Regarding Voter Turnout

Although the University kept track of who voted during the election, Ms. Hoogendoorn testified that she took the list each night, locked it in her office and picked it up the next morning and took it to the voting site. (Tr. 322). She further testified that she did not use the list to do any analysis on who had voted during the election. (*Id.*).

In addition, Dr. Urban testified that he never emailed any University faculty with a vote count during or after the election. (Tr. 331). Dr. Urban testified that he never shared a list of names of students who had voted, either during or after the election. (Tr. 329-30). He never

provided data to faculty about the number of students in their programs who had voted in the election, either during or after the election. (Tr. 331). In fact, the University's voter list kept by its observers did not even track student programs, just student names. (*Id.*; PLRB-6). The Union provided no evidence to rebut this testimony.

Thus, Dr. Urban was surprised to see an email from Dr. Steven Little, the Department Chair of Chemical and Petroleum Engineering, dated the morning of April 17, 2019, which stated, in part:

> I just wanted to send you a note to encourage you to vote in the graduate student unionization election. The polling location is the O'Hara Student Center. I was actually a little surprised to see that only 81 students from the School of Engineering (whole school) have voted so far.

(U-20; Tr. 332)(PDO Finding of Fact No. 32). Dr. Urban did not learn of that email until the ULP Charges was filed and did not see the email itself until Dr. Little was subpoenaed to testify by the Union. (Tr. 333). Dr. Urban never provided information to Dr. Little about the number of engineering students who had voted during the first two days. (Tr. 332). The Union did not put on any evidence about where Dr. Little obtained the information in his email.

After hearing the Union's testimony on day one of the ULP hearings, Dr. Urban went back and looked at the number of Chemical Engineering students who voted based on the University's watcher list and found that approximately 28 of the 46 students in Dr. Little's department voted during the last two days of the election. (Tr. 334-35). That is not surprising, though, given that the voting location on the last two days was much closer to engineering students than the first location; the second location, O'Hara Student Center, is in essence next door (less than one block) from Engineering's main building – Benendum Hall. (PLRB Order and Notice of Election).

The student president of EGSO, the Engineering Graduate Student Organization, apparently sent an email to all graduate students in the School of Engineering, stating that, "(a)s of this morning, only approximately 30% of eligible engineers had voted." (Tr. 222, 419; U-19)(PDO Finding of Fact No. 34). Dr. Urban never communicated any such statistic to anyone during the election and he does not know where that number came from. (Tr. 332). Dr. Urban was not aware of the email until the ULP was filed. (Tr. 331). The Union did not put on any evidence about the source of the email, which was sent by a graduate student, not a representative of the University.

During the election, the Union was communicating with voters and asking them to confirm that they voted. (Tr. 165). The Union used that information to keep track of the number of "yes" votes that it believed had been cast. (*Id.*). One of the members of the Union's organizing committee told the Pitt News that the Union believed that it had 700 confirmed "yes" votes through the first three days of the election. (E-2). That article was published and available on line while the election was on going. (*Id.*)

In the end, there was a 70% voter turnout rate. (Tr. 44, 431). This was a higher voter turnout than Mr. Bachy expected. (Tr. 44). In other words a vast majority of the graduate students eligible to vote in the election made their voices heard, and they voted "no representative." (Tr. 44; PLRB-4, PLRB-5).

D. <u>The ULP, Objections and Hearing Examiner's Ruling</u>

The Union's Objections raised the following allegations:

- The PLRB allowed the University to keep a list of eligible voters and check off names during the election

- The PLRB used inconsistent practices when checking voter identifications, with a disproportionate emphasis on international graduate students, which interfered with voter rights to a free and fair election.

(Union's Objections to the PLRB's Conduct During the Election, May 2, 2019). The Hearing Examiner rejected each of these claims, concluding as follows:

- "As there is no evidence in this record that any eligible voters were intimidated or threatened when they saw that an election watcher was keeping a list of voters, I conclude that the Board's policy of allowing the University to keep a list of independent voters did not materially interfere with eligible voters' franchise. "
- Because the record demonstrated that, at most, one eligible voter left the voting area without voting, "no eligible voter's right to vote was interfered with by Board policy."

(PDO at 13-14).

In its ULP, the Union raised the following allegations, the vast majority of which were either abandoned by the Union or rejected by the Hearing Examiner:

- University's use of supervisors as election watchers threatened and intimidated voters - **rejected**
- University election watchers kept a list of eligible voters and checked off names - **rejected**
- Dr. Little sent an email to Chemical Engineering graduate students which was intimidating and established voter surveillance - **sustained**

- The graduate student president of EGSO sent an email to Engineering Graduate students which was intimidating and established voter surveillance - **rejected**
- Jeff Vipperman escorted graduate students to the polling place and waited for them to vote - **abandoned**
- Election watchers used their phones in the polling area, as if taking pictures or video - **abandoned**
- University communications threatened a wage freeze - **rejected**
- University communications threatened reduced wage increases if a union were elected - **rejected**
- University communications threatened the relationship between advisors and graduate students if a union were elected – **sustained in part**
- University communications threatened more onerous and restrictive working conditions if a union were elected - **rejected**
- University communications threatened a refusal to bargain in good faith over mandatory subjects of bargaining – **sustained in part**
- The University engaged in unlawful surveillance during the election by taking pictures and filming union organizers and supporters at several locations on campus – **withdrawn**

(Union's Charge of Unfair Labor Practices, May 2, 2019; PDO at 31).

In the end, the Hearing Examiner found only that a portion of U-11, a portion of U-13 and a portion of U-20 were unfair labor practices. (PDO at 28). He concluded that the Union was unable to respond to U-11 and U-13 because they were maintained on a website,

rather than emailed to voters. (PDO at 30). He also concluded that Dr. Little's email to at most 28 potential voters was unlawful surveillance that could have affected the outcome of the election. (PDO at 30). The University objects to each of these conclusions, and their associated factual findings because they are contrary to the law and unsupported by substantial evidence in the record.

III. ARGUMENT

The PDO improperly found that: (i) a chart on the University's website that there is no evidence more than one eligible voter saw was an unfair labor practice; (ii) one sentence on the University's website that there is no evidence that more than one eligible voter saw was an unfair labor practice; (iii) an email sent by Dr. Little to less than 30 voters was an unfair labor practice; (iv) the proper remedy for these alleged unfair labor practices is a new election; (v) the burden is on the University to show that the alleged unfair labor practices did not affect the outcome of the election; and (vi) under that standard, the University did not met its burden. The Hearing Examiner's discussion of the facts underlying the three unfair labor practices he found and the remedy ordered are not supported by substantial evidence in the record and his findings and conclusions are contrary to well-established Pennsylvania law.[6]

A. Legal Standard

In reviewing exceptions, the Board has stated that the "Hearing Examiner must make the factual findings necessary and relevant to the resolution of the issues presented." *Ford City Borough*, 19 PPER P 19117 (Final Order 1988). A Hearing Examiner's findings of fact must be "fully supported by substantial evidence on the record and accurately reflect the

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[6] The University's objections are to the factual findings that are contained within the discussion section of the PDO.

underlying facts necessary to decide the issues presented in [the] case." *Association of Penn. State College and UNIV. Faculties v State System of Higher Ed. East Stroudsburg Univ.*, 32 PPER 32, 138 (2001). In *Shive v. Bellefonte Area Bd. of Sch. Dir.*, 317 A.2d 311 (Pa. Cmwlth. 1974), the Commonwealth Court stated that "[s]ubstantial evidence is more than a mere scintilla and must do more than create a suspicion of the existence of a fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (*see e.g. Bristol Borough Police Benevolent Association v Bristol Borough*, 30 PPER 138 (Final Order, 1999; *Community College of Beaver County Society of Faculty PSEA/NEA v. Beaver County Community College*, 35 PPER 24, Final Order, 2004); *International Union of Operating Engineers, Local 66 v. Franklin Township*, 43 PPER 139 (Final Order, 2012) (setting aside Hearing Examiners' Proposed Decision and Order). In other words, findings must be based on substantial evidence, not "speculation and assumption." *R.P. v. Department of Public Welfare*, 820 A.2d 882, 887 n.16 (Pa. Commw. Ct. 2003); *Arctic Cat Sales, Inc. v. State Bd. of Vehicle Mfrs.*, 110 A.3d 242, 249 (Pa. Commw. Ct. 2015). Phrases like "a more likely scenario. . ." and "it is more reasonable to assume. . . ." is indication that findings are based on mere speculation. *R.P.*, 820 A.2d at 887 n.16. Additionally, conclusions of law drawn from the facts must be reasonable, not capricious, arbitrary, or illegal. *Joint Bargaining Committee of Pennsylvania Social Services v. PLRB*, 469 A.2d 150, 152 (1983).

B. The Hearing Examiner's Findings of Fact and Conclusions of Law Regarding a Chart on the University's Website Must be Set Aside Under PLRB Precedent

The Hearing Examiner erred when he found that the following chart on the University's website was coercive, a substantial departure from the truth, and constituted an unfair labor practice:

Union Can Bargain Over:	Union Cannot Bargain Over:
• Stipends • Benefits • Working conditions* *The PLRB and Pennsylvania courts have never defined this for graduate students whose teaching and research are part of their academic training	• Budget and allocation of funds • Technology use • Programs offered • Management rights • Selection of students for academic appointments • Direction of students with academic appointments • Standards of service • Admissions decisions • Academic requirements and academic decisions • The number of academic appointments • Programmatic decisions

(PDO at 26). Specifically, the Hearing Examiner found that it was an unfair labor practice to say that "The PLRB and Pennsylvania courts have never defined this [working conditions] for graduate students whose teaching and research are part of their academic training" while at the same time listing topics such as "selection of students for academic appointments," "direction of students with academic appointments," "admissions decisions," and "academic requirements and academic decisions," as things the Union cannot demand to bargain. (PDO at 26). Notably, the Union does not dispute this, and has conceded that it would not have control over academic matters. (E-4 at 41).

The Hearing Examiner's underlying findings of fact are not supported by substantial evidence in the record, and his associated conclusions of law ignore binding PLRB precedent regarding the topics of collective bargaining and the importance of context.

1. The Hearing Examiner's Findings of Fact are Not Supported by Substantial Evidence in the Record

a. The Hearing Examiner's Finding that the Chart is Impermissible is Contrary to the Evidence and His Own Factual Findings

The Hearing Examiner's conclusion that this chart was "a substantial departure from the truth, not carefully drawn, and not based on objective fact" is not supported by substantial evidence in the record because it is contrary to his own findings regarding similar statements. (PDO at 26). This chart was similar in content to several other communications which were either not challenged by the Union, or found permissible by the Hearing Examiner. For example, Finding of Fact 44 found that the University maintained a Union-related webpage, which included an FAQ section. One such question and answer was:

> **What can be bargained?**
> A union can bargain over stipends, hours and working conditions.
> Unions *cannot* bargain over:
> - Management rights, including:
> - The selection and direction of personnel
> - Standards of service
> - Budget
> - Technology use
> - Employee counts; and,
> - Programs offered.

(U-12). The Hearing Examiner found that this statement was not a substantial departure from the truth, and that it was carefully phrased and based on objective fact. (PDO at 28). Notably, this response used the exact same language as much of the language in U-11, which the Hearing Examiner found to be objectionable. Specifically, U-11 also states that a union can bargain over stipends, benefits, hours and working conditions. It also stated that unions cannot bargain over, among other things, "management rights" (taken from PERA), "selection of students for academic appointment" (i.e., selection of personnel as set forth in PERA), "standards of service"

(direct quote from PERA), "budget and allocation of funds" (taken from PERA), "technology use" (taken from PERA), "the number of academic appointment" (i.e., employee counts), and "programs offered" (i.e., standards of service). In other words, the language of U-12, which is basically included in U-11, is permissible, yet that same language in the chart was not, notwithstanding it similarly complied with PERA. The Hearing Examiner's different conclusions regarding U-11 and U-12 are not supported by substantial evidence in the record.

> Similarly, U-6, overlaps with the language on U-11. U-6 states that:
>
> Under Pennsylvania law, there are only three issues that the University and union can bargain over:
>
> - Stipends,
> - Benefits,
> - And "working conditions."
>
> That's it.
>
> Despite claims you may have heard, the union cannot bargain over the University's budget, programs offered, admissions decisions, selection of students for academic appointments, how many academic appointments are offered, or class assignments.
>
> In addition, the Pennsylvania Labor Relations Board and Pennsylvania courts have never defined what's covered under "working conditions" for graduate students who teach and conduct research as part of their academic experience. We don't know how a union could affect research hours or other core components of the educational experience, because this is uncharted territory.

(U-6). The Hearing Examiner Finding of Fact number 40 was that this language was emailed to students on April 4, 2019. Although he found this language to be an "enigma," he ultimately did not find that the email constituted an unfair labor practice. (PDO at 27). The conclusion that this language is objectionable in the chart, but not in an email, is entirely inconsistent with other factual findings and not supported by substantial evidence in the record.

Finally, the Hearing Examiner also found that U-16 was not coercive, yet it includes substantially similar language to U-11. (PDO at 28). U-16 stated:

> **Will a union given me the right to decide what tasks are part of my academic appointment?**
>
> A union might seek to bargain over assignments, but the courts may have to decide whether they would have the ability to do so. The graduate union at Temple University does not have the right to bargain over assignments. Even the unionized faculty at Temple University do not have a say in how their classes are assigned.

(U-16; PDO at 27). Similarly, U-11 indicated that the PLRB and Pennsylvania courts have never defined working conditions for graduate students whose teaching and research are part of their academic training. U-16 provided the exact same information, just by way of an example: Temple University. By concluding that the same information was acceptable in one location, U-16, but unacceptable in another, U-11, the Hearing Examiner clearly contradicted himself.

Therefore, Hearing Examiner's conclusion that this chart was an unfair labor practice is not supported by substantial evidence in the record. Instead, it is contradicted by his own factual findings regarding other similar, if not identical, content disseminated by the University.

b. The Hearing Examiner's Findings About the Coercive Effect of the Chart Are Not Supported By Substantial Evidence in the Record

The Hearing Examiner places great weight on the fact that the chart was available on the internet, and was available "to be viewed by anyone in the world with internet access and the amount of eligible voters who viewed that content ***could have*** included a substantial number of the voting pool." (PDO at 30) (emphasis added). The Hearing Examiner goes on to say, "[i]t ***is reasonable to assume*** that more than 37 eligible voters ***may have*** viewed and been affected by such content." (*Id.*) (emphasis added). The Hearing Examiner's conclusion about how many voters could have been impacted by this chart is based entirely on conjecture, bare assumptions, and unsupported by any record evidence. (PDO at 30). Based on that language alone, the

Hearing Examiner's findings must be set aside. *See R.P.*, 820 A.2d at 887 n.16 (finding that phrases such as "a more likely scenario. . ." and "***it is more reasonable to assume***. . . ." is indication that findings are based on mere speculation which is impermissible to support a finding which must be based on substantial evidence in the record) (emphasis added); *Arctic Cat Sales, Inc.*, 110 A.3d at 249 (reiterating that "assumptions" are not permissible to support a finding that must be based on substantial evidence in the record).

In fact, the record is devoid of any evidence that more than one eligible voter visited the website, particularly in light of the fact that it required affirmative initiative on the part of the voters. To the contrary, the record is full of evidence about how proactive a voter would have to be to access the website and find this information. One Union witness testified that an eligible voter would first have to open an email from the University. (Tr. 122-23). Then, a voter would have to click on a hyperlink within the email. (*Id.*). The voter would then be sent to the University's website about unionization. (*Id.*). Then the voter could go to the specific section of the webpage that they sought, for instance, the "Collective Bargaining Basics Page." Even upon arriving at the page, the chart is below the fold, and would require the voter to scroll down. (U-11). Therefore, the Union's own witness acknowledged that arriving at U-11 required several proactive steps from eligible voters. Mr. Madden's testimony ***is the only evidence in the record*** that any eligible voter accessed the website or saw the chart. ***There is NO*** evidence in the record that any eligible voter was influenced by its content. Therefore, the Hearing Examiner's acknowledged assumption that a substantial number of voters, in his words, ***"could have"***, seen this chart and been impacted by it is not based on substantial evidence in the record, but rather speculation and assumptions. *St. Joseph's Hospital v. Pennsylvania Labor Relations Board*, 373 A.2d 1069, 1071 (Pa. 1977) (conclusions drawn from facts must not be arbitrary, capricious or

illegal); *In re Appeal of Cumberland Valley School District*, 394 A.2d 946, 949 (Pa. 1978) (conclusions drawn from facts must be reasonable); *R.P.*, 820 A.2d at 887 n.16.

Finally, the Hearing Examiner ignored substantial evidence in the record about the sophistication of the eligible voters, which undermines any conclusion that such voters were intimidated, swayed, or coerced by a single chart that they had to affirmatively seek out among multiple pages on the University's website. All the eligible voters were graduate students at the University. The University is a prestigious, public university, and an undergraduate degree is a prerequisite to matriculation as a graduate student. As such, these voters all had almost two decades of education, if not more. These voters were all pursuing advanced degrees, which require critical thinking and research skills. (*See* Transcripts from hearings held in October, 2018 in matter PERA-17-355-W, (hereinafter "Oct. 2018 Tr.") at 425, 586, 596, 1058). The notion that such voters would be intimidated, swayed or coerced by this chart is highly unlikely, and in this case, has not been established by even a scintilla of evidence. *See Shive,* 317 A.2d at 311 (Commonwealth Court stating that "[s]ubstantial evidence is more than a **mere scintilla** and must **do more than create a suspicion of the existence** of a fact to be established") (emphasis added). The Hearing Examiner's assumption of likely coercion is not based on substantial evidence in the record, is based solely on speculation, and must be set aside as a matter of law. *Arctic Cat Sales, Inc.*, 110 A. 3d at 249 (agency findings must be based on substantial evidence, not "speculation and assumption") (internal citation omitted).

c. The Hearing Examiner's Conclusion that the Union Did Not Have the Opportunity to Respond or Effectively Rebut the Chart is Not Supported by Substantial Evidence in the Record

The Hearing Examiner's conclusion that the Union did not have the opportunity to respond or effectively rebut the chart – solely because it is on the internet – is illogical and not supported by substantial evidence in the record. (PDO at 24). The Hearing Examiner found that

"the maintenance of the chart (U-11) on the University webpage through the entire election defeats any ability of the Union to respond effectively." (PDO at 26). He found that "the contents of the University's webpages including the statements on the webpages in question were continuously published each day." (PDO at 24). Importantly, there is ***no evidence of that fact in the record.*** Ironically, however, the Hearing Examiner found that communications via more direct means, including an email and similar statements made ***in person*** at town halls, were not an unfair labor practice because the Union had the opportunity to respond. Yet, the Hearing Examiner found that a passive webpage that required affirmative action on the part of anyone interested in viewing it somehow prevented the Union from effectively responding, despite the Hearing Examiner's finding of fact that the Union had the ability to respond. (Finding of Fact 51). This inconsistency alone warrants setting aside the conclusion that the Union could not effectively rebut or respond to the chart.

Moreover, the record demonstrates that the Union had the opportunity to and did address many University statements. Dr. Urban testified that the Union often used social media to communicate with voters (Tr. 393, 404), and certainly could have used that forum to respond to university communications instantaneously. In fact, the record further demonstrates that the Union consistently took advantage of that opportunity to engage with voters, up to and through the election period. (Tr. 165, 187, 412) (E-3, E-4) (Union representatives appeared at the School of Engineering information session and separately answered the identical set of questions to the ones posed to Dr. Urban, including questions on what could be bargained); (Tr. 385-86) (Union organizers appeared at a session sponsored by the Graduate and Professional Student Government that the University did not attend, and also spoke at the School of Computing and Information even following Dr. Urban's remarks.); (Tr. 382-86) (Union supporters were present

at an event at the School of Computing and Information and responded to University communications); (Tr. 391-92) (Union supporters responded to University communications by providing written handouts after first information session).

Notably, the Union specifically addressed the information in U-11 that the Hearing Examiner found problematic. During a town hall with students from the School of Engineering on April 9, 2019, the Union and the University separately addressed the topics encapsulated in U-11. (E-3, E-4). The Union's counsel explicitly stated that forming a union ""only impacts your employment relationship at the University, not your relationship as a student" and "**the University . . . would not have a legal obligation to bargain with the Union over your student status.**" (E-4 at 41) (emphasis added). The Union thus conceded that it would not have any role in academic matters and that the University would not be obligated to negotiate with the Union over topics related to voters as students, and not as employees. Thus, the issue of mandatory subjects of collective bargaining was clearly discussed by the Union as well. And the Union agreed with the very statements that it now objects to – that academic matters are not ones that the Union can bargain over. (E-4 at 42).

There is **no record evidence** to support the conclusion that any eligible voter only gleaned information about these topics from the singular chart, and from no other source, and then was materially affected by it. Accordingly, because the Hearing Examiner found that the Union had an opportunity to communicate with voters, and the record demonstrates that it, in fact, did so, the Hearing Examiner's conclusion that the Union did not have the opportunity to effectively rebut the chart because it was on the "internet" is not supported by substantial evidence, let alone any evidence, in the record.

2. The Hearing Examiner's Conclusions of Law Are Contrary to Established Precedent

The proper analytical test for whether election communications constitute threats was first articulated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), which was subsequently adopted by the Pennsylvania courts. *See Cty. of Berks v. Pa. Labor Rels. Bd.*, 79 A.3d 8 (Pa. Commw. Ct. 2013). Under the *Gissel* test, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Cty. of Berks*, 79 A.3d at *13. Further, employer predictions are lawful when "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, 395 U.S. at 618. Employer predictions only become unlawful threats when "there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities." (*Id.*). Therefore, making predictions couched in conditional, rather than definite, terms is acceptable so long as those predictions are based on objective facts.[7]

Furthermore, *Upper Merion School Dist.*, 3 PPER 386 (Nisi Decision and Order, 1973) provides a primer on allegedly coercive communications in the election context. The PLRB emphasized that alleged misstatements must constitute substantial departures from the truth before the Board will find an unfair practice. (*Id.* at 388.). *Upper Merion* also instructs that the "Board must balance the rights of the parties to express themselves on the issues." (*Id.*). The

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[7] The PLRB will look to NLRB case law when it is consistent with PERA and PLRB case law. *Am. Fed'n of State, etc., Council 13 v Commonwealth, Pa. Labor Relations Bd,* 529 A.2d, 1188, 1190 (Pa. Commw. Ct., 1987); (*See e.g. Temple Association of University Professionals Local 4531 AFT v. Temple University*, 37 PPER 80 (Proposed Decision and Order, 2006) (looking to NLRB case law to determine whether a communication was an unfair labor practice).

Board has no desire to "become a censor of non-coercive campaign propaganda." (*Id.*). Rather, the Board will "leave that task to the common sense and intelligence of the voters." (*Id.*). As noted in *Conemaugh Valley Memorial Hospital*, 2 PPER 116 (Nisi Decision and Order, 1972), vigorous campaigning is to be encouraged because it is the best way for employees to be informed and evaluate the positions of each side. Thus, vague or inartistically phrased messages, or even messages that depart from the truth, **are not grounds for setting aside an election**. Unless the comments had a real, substantial impact on the election, the election should not be set aside. *See Upper Merion School Dist., 3 PPER 386.*

a. The Hearing Examiner's Conclusion that the Chart "is a substantial departure from the truth, not carefully drawn, and not based on objective fact" (PDO at 26) is Erroneous as a Matter of Law

The Hearing Examiner's conclusion that the University's chart represented a substantial departure from the truth, is not carefully drawn and is not based on objective fact, is inconsistent with Pennsylvania law.

Notably, neither the Union nor the Hearing Examiner ever pointed to any authority that demonstrates that any of the statements in the chart were inaccurate under Pennsylvania law, which warrants sustaining the exceptions on that basis alone. That's because the University's chart truthfully depicted the issues that Pennsylvania law defines as mandatory subjects of collective bargaining and noted where there are open questions as well. This is clear from the face of many of the listed topics. For example, the Union never contended that PERA governs the University's admissions decisions, yet, the Hearing Examiner found that the chart at U-11, which includes the topic of "admissions decision" as a subject the Union cannot demand to bargain, was a substantial departure from the truth. This finding, along with the others in the chart that the Hearing Examiner cites - "selection of students for academic appointments,"

"direction of students with academic appointments," and "academic requirements and academic decisions" – is contrary to Pennsylvania law, as none of the listed topics is a mandatory subject of bargaining under PERA law.[8] 43 P.S. § 1101.701.

Specifically, Section 701 of PERA defines wages, hours and other terms and conditions of employment as mandatory subjects of bargaining. 43 P.S. § 1101.701. Section 702 of PERA provides, in relevant part, that "[p]ublic employers shall not be required to bargain over matters of inherent managerial policy, which shall include but not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel." 43 P.S. § 1101.702 (emphasis added).

Whether a particular matter falls within the scope of section 702 rather than 701 is determined by applying the balancing test established by the Pennsylvania Supreme Court in *Pennsylvania Labor Relations Board v. State College Area School District*, 337 A.2d 262 (Pa. 1975). In *State College* the court held:

> [W]here an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the [PLRB] in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

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[8] This is further demonstrated by the fact that none of these topics are subjects of mandatory bargaining under the Temple collective bargaining agreement. *See* Temple University Graduate Student Association and Temple University Collective Bargaining Agreement, 2018-2022, available at (http://www.tugsa.org/wordpress/wp-content/uploads/2018-2022-TUGSA-Collective-Bargaining-Agreement.pdf)

Id. at 268. The chart in U-11 follows these requirements of PERA by identifying those things that are **expressly listed in PERA** Section 702 as management rights over which a union has no right to bargain. 43 P.S. § 1101.702. This includes "budget and allocation of funds," "technology use," "programs offered," "management rights," "standards of service," and the "selection" and "direction" of graduate students on academic appointments (i.e. personnel).[9] Therefore, there can be no doubt that the University cannot be required to bargain over such topics.

The other topics listed on U-11 as items a union has no right to bargain are similarly well established under Pennsylvania law. For example, the PLRB and Pennsylvania courts have long held that the size of the complement, phrased as "number of academic appointments" on U-11, is a matter left to the exclusive discretion of management. *Ellwood City Police Wage and Police Unit v. Ellwood City Borough*, 36 PPER 89 (Final Order, 2005). In addition, the PLRB has found that workload is a managerial prerogative. *Joint Collective Bargaining Committee of the Pennsylvania Social Services Union v. PLRB*, 469 A.2d 150 (Pa. 1983).

Nor can there be any question that "academic requirements and academic decisions" and "admissions decisions" are not subject to bargaining. Initially, they are not subject to bargaining because they are not employment under any definition. In the ODSEL, in fact, the Hearing Examiner found that academics and academic appointments, which he found to be employment, could be separated. (PLRB-1 at 13, 19). Yet, he now faults the University for making that same distinction without any basis in the law for doing so. In addition, the Union

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9 These academic appointments are what the Hearing Examiner found to be employment. (PLRB-1 at 19).

has conceded that academic matters are not subject to bargaining. (E-4 at 41). Thus, the University cannot properly be faulted for stating that academic decisions, which both the Hearing Examiner and the Union have previously conceded are not employment, cannot be bargained by the Union. Such a finding is contrary to the law and common sense.

In addition, the PLRB has found that requiring teachers to provide assessment data, to determine whether students are satisfying course or program objectives, is a managerial prerogative. *Faculty Federation of Community College of Philadelphia Local 2016, AFT, ALF-CIO v. Philadelphia Community College*, 50 PPER 35 (Proposed Decision and Order, 2018). Thus, the University has sole control over academic expectations and degree requirements, and cannot be required to bargain over same.

Similarly, admissions decisions remain with the University, and the Union has no right to bargain over them, even if they were considered analogous to hiring decisions, which they should not be for reasons articulated below. The PLRB has long held that the ultimate selection of candidates for positions, including evaluation of qualifications and standards for promotion, remains a managerial prerogative within the employer's right to select, direct and discipline personnel. *Fraternal Order of Police, State Conference of Liquor Law Enforcement Lodges v. Commonwealth of Pennsylvania*, 32 PPER P 32083 (Final Order, 2001). This logic extends to the decision to admit students to University programs, schools and centers. This topic is thus well outside the Union's purview, and properly listed as a topic the Union cannot demand to bargain on U-11.

In sum, all of the topics listed as excluded from bargaining on U-11 are firmly grounded in Pennsylvania law. The Hearing Examiner's findings that the University's statements are a substantial departure from the truth are erroneous as a matter of law.

In addition, the Hearing Examiner faulting the University for highlighting that there are areas of uncertainty regarding what can be bargained is nonsensical and contrary to law. How can it be a departure from the truth to acknowledge that there are open questions about what can be bargained? It cannot be. That is the truth.

Moreover, as noted in Section III(B)(i)(1) above, the Hearing Examiner found that other statements by the University that are substantively identical are permissible statements that are not departures from the truth and carefully drawn. (PDO at 27-28). There is no substantive difference in these statements and the Hearing Examiner's contrary conclusions demonstrate that his conclusions have no basis in law. Even if the Hearing Examiner believes that the phrasing in U-11 is less artful than in U-12, U-14, and U-16, that is not enough to establish an unfair labor practice or set aside an election based on those statements. To the contrary, as the Hearing Examiner noted and then ignored, the PLRB has long held that "the mere fact that a message is inartistically or vaguely worded of subject to misinterpretation will not suffice to establish misrepresentation that would lead us to set the election aside." (PDO at 18 (quoting *Upper Merion School Dist.*, 3 PPER 386 (Nisi Decision and Order, 1973)).

Finally, the Hearing Examiner's finding that the statements are "not carefully drawn" and "not based on objective fact" (PDO at 26) applies the wrong legal standard. That standard, which comes from the United States Supreme Court decision in *Gissel Packing*, applies to cases where there are alleged to be a "threat of reprisal or force or promise of benefit." 395 U.S. at 618-19. The Hearing Examiner recognized as much, stating that the standard is used for determining when employer statements are threats. (PDO at 19). Despite that, the Hearing Examiner applied this standard to the chart at U-11, even though a statement about what can and cannot be bargained is not a threat, it is a summary of Pennsylvania law and should be analyzed

as such. In doing so, he fails to heed the holdings of *Upper Merion School Dist.*, and instead becomes exactly what the Board cautioned against – "a censor of non-coercive campaign propaganda." 3 PPER 386.

Thus, the Hearing Examiner's findings that the chart in U-11 is an unfair labor practice fails to follow well-established legal standards and is erroneous as a matter of law and must be overturned.

b. The Hearing Examiner Erred as a Matter of Law in Not Considering the Statements as a Whole, In Context

The Hearing Examiner's conclusion that this chart constitutes an unfair labor practice also disregards controlling precedent regarding the consideration of the context of election communications. The PLRB is tasked with examining the context in which statements are made when considering whether communications are coercive. *See, e.g., Neshaminy Federation of Teachers, Local Union 1417 v. Neshaminy School District*, 47 PPER 12 (Proposed Order and Decision, 2015) (must consider tone and context of employer representatives' statements); *Erie County Technical School Federation of Teachers v Erie County Technical School*, 48 PPER 41 (Final Order 2016) (communications must be viewed in context); *AFSCME, District Council 85 Local 3530 v. Millcreek Township*, 31 PPER P31,056 (Final Order, 2000) (after performing an "objective review" of the employer's communication, and the "totality of the circumstances in which it was issued," rather than considering it "out of context and . . . in a vacuum," the Hearing Examiner found no independent unfair labor practice.).

Similarly, the NLRB holds that in determining whether a statement is objectionable, "we must consider the totality of the employer's relevant statements in the context in which they were made." *Keystone Auto. Indus.*, 2017 NLRB LEXIS 191, *8 (N.L.R.B. April 13, 2017). Furthermore, oral and written statements must be construed together to determine

their reasonable tendency to coerce the employees. *Uarco, Inc.*, 286 N.L.R.B. 55 (1987). In that vein, it is well established that an employer may lawfully compare union and nonunion wages and benefits, respond to employee requests for information about such wages and benefits, and make statements of historical fact. *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159 (2004).

The recent NLRB decision in *Didlake Inc.*, 367 NLRB No. 125 (2019), is instructive. There, the NLRB found that the employer wrongly stated that if the union won, it would mean workers would have to join the union and pay dues as a condition of employment. Yet, the NLRB ruled that mere misstatements of law do not merit a second election. "Viewing the statements at issue in the overall context of the organizing campaign, we find that the Employer's mere misrepresentations regarding the Union's ability to compel membership or enforce the payment of dues do not rise to the level of objectionable conduct." (*Id.*).

Here, the Hearing Examiner failed to consider the well-established body of decisions at both the state and federal level regarding the importance of context when he determined that the chart in U-11 was an unfair labor practice. The chart was a single, passive statement, made in direct response to student questions, on a website that contained numerous pages of information – including over 40 frequently asked questions – that were either not challenged by the Union or found lawful by the Hearing Examiner, and was also part of a communications campaign that involved approximately 50-60 emails that were also either not challenged by the Union or found lawful by the Hearing Examiner. (U-4, U-7, U-8, U-9, U-10, E-12, E-13, E-14, E-15, E-16, E-17, E-19, E-20, E-21, E-22, E-23) (unchallenged emails); (U-3, U-5, U-6, U-18) (emails found to be lawful by the Hearing Examiner); (E-5, E-6, E-8, E-9, E-10)(examples of student questions received via the anonymous portal or at events regarding

subjects of mandatory bargaining); (Tr. 338-39, 348, 362-63, 394-95 432-33) (Dr. Urban testimony that this response was offered in response to student inquiries, particularly after numerous questions at in-person town halls). The chart was also offset by blocks of text, which have not been challenged, explaining the collective bargaining process and collective bargaining agreements in general. (*See* U-11). And, right above the chart is an explanation that the University would be required to bargain in good faith with the Union. There is nothing threatening, intimidating, coercive, or improper about the chart. Yet, amidst this wealth of information, the Hearing Examiner improperly cherry-picked this single chart, and found it to be coercive.

The Hearing Examiner also failed to consider this chart in legal context, specifically, the lack of guiding Pennsylvania law as to the "working conditions" of graduate students as a bargainable issue. The University repeatedly noted that there were open questions about how existing law under PERA would apply to the unique situation of graduate students whose "work" is integrated with their academics, because neither the PLRB nor the courts have ever had to address this issue given the very different bargaining unit at Temple University and the contractual limits on what can be bargained there. (U-11, U-16; Tr. 394-95). To the extent the chart expressed uncertainty over what could happen with a union, that can hardly be considered coercive or a suggestion that bargaining would be futile. *Cty. of Berks v. Pa. Labor Rels. Bd.*, 79 A.3d 8, 12 (Pa. Commw. Ct. 2013) (predictions about potential consequences of unionization are lawful if "carefully phrased on the basis of objective fact."). What the Hearing Examiner ignored was that the items listed in the chart were from the statute related to what a union cannot demand an employer to bargain over; that is not disputed as it is statutorily provided. What is in question are the "working conditions", i.e., the bargainable subjects. The

Hearing Examiner thus improperly conflated working conditions with management rights in finding that there is inconsistency in the University's chart.

The Hearing Examiner's disregard for the context in which the challenged statement was made is erroneous as a matter of law. *See AFSCME, District Council 85 Local 3530*, 31 PPER P31,056 (finding no ULP after "objective review" of the employer's communication, and the "totality of the circumstances in which it was issued," rather than considering it "out of context and . . . in a vacuum").

c. The Hearing Examiner's Conclusion that the Chart Significantly Impacted the Election is Erroneous as a Matter of Law

The Hearing Examiner also concluded, contrary to law, that U-11 could have significantly impacted the outcome of the election. In doing so, the Hearing Examiner misstates the legal standard as to how to prove a lack of material effect on the results of an election, as discussed in Section III(F) below.[10]

Under the proper analytical standard, the PLRB has found that only last minute communications that do not allow the other party ample opportunity to respond merit setting aside an election. *Upper Merion,* 3 PPER at 387 (where union had four days' time to reply to employer's letter and fact sheet - which described union dues, bargaining procedures and

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[10] Even assuming, *arguendo*, that *W. Psychiatric Inst. & Clinic of Univ. of Pittsburgh of Com. Sys. Of Higher Ed. v. Com. Labor Relations Bd.*, 330 A.2d 257 (Pa. Commw. Ct. 1974) applies, it does not state that it is the University's burden to show a limited number of eligible voters were affected by any single communication. Rather, *Western Psychiatric* stands for the proposition that the defending party has the duty to show that its actions did not have a material impact on the election. Materiality is not defined by the number of voters who may have interacted with a communication, but by the number of voters who may have interacted with a communication ***and*** changed their behavior accordingly. The Hearing Examiner thus unlawfully attempts to change the University's burden under *Western Psychiatric*. The University should not be held to this unsupported standard that exceeds the charged party's burden under *Western Psychiatric*.

potential for strikes - and union did in fact meet with voters after the letter was sent out, the communication was not an unfair labor practice); *Conemaugh Valley Memorial Hospital* 2 PPER 116 (unlawful electioneering where communication took place within 24 hours of an election); 34 Pa. Code § 95.52(b). By contrast, this chart was posted online well before the election and was not targeted at any particular voter. In fact, as discussed above in Section III(B)(i)(2), students would have to affirmatively seek out not only the website and the web page, but also find this specific chart. There is no evidence in the record that any voter, other than a single Union witness, ever did so. Moreover, as discussed above, the Hearing Examiner affirmatively found in Finding of Fact 51 that the Union had the opportunity to respond. Thus, the Hearing Examiner's conclusions to the contrary are erroneous as a matter of law, no matter what standard applies.

In addition, the Hearing Examiner's conclusion that the communication was an unfair labor practice because it was maintained on a webpage is unsupported by law or common sense. Unlike a mandatory meeting where employees have to hear the employer's message, the University did not force students to hear this or any other message. Moreover, the Hearing Examiner did not even find that any of the communications which were emailed to students were coercive. Here, students had to affirmatively seek out the website, navigate to the page and then find this particular chart. This entirely passive communication was not coercive and does not warrant setting aside the election. *1621 Route 22 W. Operating Co. LLC v. NLRB*, 725 F. App'x 129, 140 (3d Cir. 2018) (electronic communications such as emails and texts are **voluntary and non-coercive**) (emphasis added).

Accordingly, the Hearing Examiner's conclusion that this chart did not provide ample opportunity for the Union to respond thus stands in sharp contrast to binding PLRB precedent, and must be set aside.

C. The Hearing Examiner's Findings of Fact and Conclusions of Law Regarding One Sentence Out of Thousands Must be Set Aside Under PLRB Precedent

The Hearing Examiner erred as a matter of fact and law when he determined that a single sentence within a two paragraph answer, which appeared in a larger explanation of collective bargaining, on a webpage that students had to affirmatively navigate to, out of the thousands of lines of text that were communicated by the University and the Union in the days, weeks, and months leading up to the election, was an unfair labor practice. The sentence is: "With a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments." (U-13). The Hearing Examiner made factual findings that were unsupported by substantial evidence in the record, and drew legal conclusions without reference to any controlling authority, and otherwise disregarded controlling authority to the contrary.

1. The Hearing Examiner's Findings of Fact are Not Supported by Substantial Evidence in the Record

The Hearing Examiner found that the sentence "[w]ith a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments," was referenced in "numerous University emails to eligible voters." (U-13; PDO at 24). Yet, sentence – within a larger body of text on the University's FAQ webpage – was **not emailed** to students **once**, let alone numerous times. The record is devoid of any facts to support

the Hearing Examiner's finding otherwise. Rather, the allegedly offending sentence was posted on the University's webpage about unionization, in the section on FAQs, in response to a question that was titled "Will a union give students more say in how decisions about academic appointments are made?" (Tr. 129). This single sentence was one among thousands on the University's webpage, and, importantly, the webpage was a passive site which means that students had to affirmatively look it up, navigate to the site, search for FAQs, read the 40 FAQs and then read this specific sentence. There is no evidence in the record that more than one eligible voter actually did this, let alone any evidence that this sentence appeared anywhere else or was sent to students. (Tr. 122-23, 130). In the absence of any record evidence about emails containing this sentence, the Hearing Examiner's conclusion that this sentence was referenced in numerous University emails to eligible voter plainly is not supported by substantial evidence in the record.

Similarly, there is no evidence in the record to support the Hearing Examiner's conclusion that this sentence was widely read, and that it affected eligible voters to the extent that it could have impacted the election. This sentence was solely maintained online, and there is no evidence that more than one eligible voter saw this sentence online. (Tr. 122-23, 130). Although this was a close election, proof that only one eligible voter saw this sentence and may have been affected by its substance does not warrant setting aside an in person election where roughly 1500 people made their voices heard freely and fairly. *Susquehanna County*, 31 PPER 129 (Final Order, 2000) (where Union won by 16 votes, with four challenged ballots, the vote one additional employee would not have no material effect on election, and new election will not be ordered); *Philadelphia Joint Board*, 41 PPER 55 (Final Order, 2010) (even if rival union could prove other union held objectionable "ballot parties," it would not have affected outcome

of the election where other union won by double the votes). Moreover, as discussed in Section III(B)(i)(3) above, posting this sentence online does not make it inherently more coercive or more likely that students saw this sentence and were affected by it. *See 1621 Route 22 W. Operating Co. LLC*, 725 F. App'x 129, 140 (electronic communications such as emails and texts are **voluntary and non-coercive**) (emphasis added)

2. The Hearing Examiner's Conclusions of Law are Contrary to Established Precedent

Critically, once again, the Hearing Examiner failed to cite any authority for his finding that the singular sentence – which merely explained the PLRB prohibition on direct dealing – constituted an unfair labor practice. In fact, the Hearing Examiner ignored PLRB precedent defining direct dealing, and the fact that the University would undoubtedly have faced an unfair labor practice charge if it had either communicated or engaged in the behavior it told students that it could not – speak to them directly about the terms of academic appointments, such as stipends or benefits. In the ODSEL, the Hearing Examiner specifically found that the academic appointment is what makes these students also employees. (PLRB-1 at 19). He excluded students who are not on academic appointments because he found that they are not employees under PERA. (*Id.*). Thus, according to the Hearing Examiner, it is the academic appointment which is the "work" and the "terms and conditions" that transformed these students into employees. It is axiomatic that an employer cannot deal directly with unionized employees regarding the terms and conditions of their work. That is exactly what the University said here – "[w]ith a union, the University is not permitted to **discuss academic appointments directly** with students, and as a result, students lose the ability to have an individual say in their specific program when it comes to appointments." (U-13)(emphasis added). Translated into the typical employment context, the disputed sentence says nothing more than an employer cannot discuss

the terms and conditions of employees' work directly with them, which means the employees lose the ability to have an individual say in their terms and conditions of employment. That is the truth and it is the definition of direct dealing. Surely, if the University said: "Don't worry if there is a Union, nothing will change and we will continue to work directly with you on the terms and conditions of your work" – the Union would rightly cry foul. By ignoring applicable law, the Hearing Examiner arrived at a conclusion that is contrary to law and must be set aside.

a. The Hearing Examiner's Conclusion that this Sentence "is a substantial departure from the truth, not carefully drawn, and not based on objective fact." (PDO at 24) is Erroneous as A Matter of Law

Section 701 of PERA states that "[c]ollective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." 43 P.S. § 1101.701. Further, Section 606, provides that "[r]epresentatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employes in such unit to bargain on wages, hours, terms and conditions of employment." 43 P.S. § 1101.606. Therefore, PERA requires employers to bargain with the duly elected, certified union, not directly with the employes, either collectively or individually. The importance of Section 606 is underscored by the fact that an employer engages in an unfair practice when it bypasses the exclusive bargaining representative and deals with the employes. 43 P.S. § 1101.1201(a)(5).

In responding to student questions about what could change as a result of collective bargaining, whether a union would give students more say in decisions about how academic appointments are made and whether a union could impact students' ability to work faculty to tailor their academic appointments, the University was cognizant of the fact that the

PLRB has found employers to have engaged in unlawful direct dealing in analogous situations. For example, in *Warwick School District*, 4 PPER 146 (Nisi Decision and Order 1974), the employee brought personal concerns about her individual employment situation to her employer. When the employer tried to assist the employee by addressing her concerns in an individual manner, the union filed an unfair labor charge, which the Board upheld and found the employer engaged in an unfair labor practice. Here, in the underlying representation proceedings, there is significant evidence in the record about how academic appointments (what the Union claims and the Hearing Examiner found is work) are tailored individually and exceptions are made on an individual basis for students all of the time. (*See* Oct. 2018 Tr. 1508-09)(faculty allow students to trade assignments amongst themselves); (*Id.* at 1340-41) (Psychology Department tailors the program to an individual student's needs and career goals by shaping the clinical, teaching and research experience that student receives (which is provided through appointments – i.e., job assignments)). The University, as a matter of law, would not be able to directly deal with students individually on their academic appointments/work without violating PERA.

NLRB guidance provides an equally cautionary tale to the University. In *In Re Pony Express Courier Corp.*, 1996 NLRB LEXIS 83 (February 16, 1996), the Administrative Law Judge found that an employer's offer of an alternative position to an existing employee constituted direct dealing. Similarly, the NLRB has held that a change to existing job duties constitutes an unlawful unilateral change. *Ozburn-Hessey Logistics, LLC*, 366 NLRB 177 (2018). Thus, with a union, the University could face an unfair labor practice charge if it discussed an individual graduate student's academic appointment (which the Hearing Examiner determined was the employment of these students) terms and conditions, or discussed individualized adjustments to the academic appointment terms and conditions with students

directly. (*See* Oct. 2018 Tr. at 1508-09, 1079). The University merely explained to students that if a Union were elected, the University would not undermine the Union's authority by deliberately discussing subjects of mandatory collective bargaining with represented graduate students outside the negotiating process. Curiously, the Union should appreciate, rather than attack, this communication. The University cannot, and should not, be penalized for communicating its commitment to abiding by relevant labor law, as it did in U-13 and U-2, among other places, and trying to avoid any semblance of direct dealing with graduate students.[11] A conclusion that this statement constitutes an unfair labor practice is in conflict with controlling labor law about direct dealing and must be set aside.

b. The Hearing Examiner Erred as a Matter of Law in Not Considering the Statement as a Whole, in Context

Furthermore, the Hearing Examiner fails to consider the single sentence her found problematic in U-13 in context, as he is required to do by law, as discussed in Section III(B)(ii)(2), *supra*. As explained above, *Upper Merion* emphasizes that alleged misstatements must constitute substantial departures from the truth before the Board will find an unfair practice. Because the Board has no desire to "become a censor of non-coercive campaign propaganda," it "leave[s] that task to the common sense and intelligence of the voters." (*Id.*). As noted in *Conemaugh Valley Memorial Hospital* 2 PPER 116, vigorous campaigning is to be encouraged because it is the best way for employees to be informed and evaluate the positions of each side. Thus, inartistically phrased or vague messages, or even messages that depart from the truth, are not grounds for setting aside an election. Only if the comments had a real, substantial impact on the election, the election should not be set aside. *See Upper Merion*, 3 PPER 386.

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[11] Notably, the Hearing Examiner found that University's similar statements in U-12 were appropriate. (PDO at 28).

Under this framework, the University's statement regarding how a union could impact the unique graduate student experience at Pitt was plain and truthful, and not a threat. In fact, the NLRB has held that statements concerning loss of access to management in the event of unionization do not constitute threats, but "simply explicates one of the changes which occur between employers and employees when a statutory representative is selected." *Overnite Transp. Co.*, 296 N.L.R.B. 669 (1989); *Tri-Cast, Inc.*, 274 N.L.R.B. 377 (1985) ("There is no threat, either explicit or implicit, in a statement **which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before**.") (emphasis added). The University was not threatening that students could never have a say in their academic appointment, rather, it was acknowledging that direct, individualized dealing is not permissible, which is a change. That is a fact. (*See e.g.* Collective Bargaining Agreement between Temple University and Temple University Graduate Students' Association, 2018-2022 at Article 1, available at (http://www.tugsa.org/wordpress/wp-content/uploads/2018-2022-TUGSA-Collective-Bargaining-Agreement.pdf) (collective bargaining agreement covers graduate students on academic appointment).

The sentence must also be considered in the context of all of the communications in the campaign, and even in the context of the question that it was responding to and the sentences that come before and after it – a fact the Hearing Examiner impermissibly ignores. The question and answer, in full, state:

> Will a union give students more say in how decisions about academic appointments are made?
>
> Currently, students can work with their faculty advisor and their program to make decisions about their own academic appointments.
>
> With a union, the University is not permitted to discuss academic appointments directly with students, and as a result, students lose the ability to have an individual say in their specific program when

> it comes to appointments. The union has the exclusive right to speak on the behalf of graduate students when it comes to academic appointments and assignments could be determined in ways that are less adaptive to individual student needs.
>
> It's useful to note that the Union cannot negotiate how many academic appointments the University offers.

(U-13). The sentences bookending the allegedly coercive statement diminish any sense of coercion or falsity. The surrounding sentences serve to explain voter concerns, and compare the potential impacts of a union to the current situation at the University. The University was not saying that it would never communicate with graduate students if a union were elected, just that it would not impermissibly deal directly with graduate students about the terms of conditions of employment if a union were elected. Analyzing this sentence, in isolation and ignoring the adversarial union organizing atmosphere, goes against PLRB precedent. *See generally, Neshaminy Federation of Teachers, supra*; *Erie County Technical School Federation of Teacher, supra; AFSCME, District Council 85 Local 3530, supra.*

Moreover, this was just one FAQ response among forty-plus questions. It was also one FAQ response within a twelve question subsection of the FAQ entitled, "What Could Change as a Result of Collective Bargaining?" The answer was posted in response to student questions about how unionization would impact their ability to work directly with a faculty advisor on issues like stipends, work hours and such. (Tr. 348; E-4 at 41). The University solely sought to address the concerns of eligible voters, and provide them with as much information as possible so that they could make an informed decision.

At a minimum, the Hearing Examiner should have considered this sentence in the overarching context of the University attempting to communicate the potential implications of a union. In that regard, Pennsylvania courts have held that expressing uncertainty over what could happen can hardly be considered coercive or a suggestion that bargaining is futile. *Cty. of Berks*,

79 A.3d at *12 (predictions about potential consequences of unionization are lawful if "carefully phrased on the basis of objective fact."). Here, the University explained in several sentences that things could change because, legally, the union is the entity that is authorized to speak on behalf of the students regarding their appointments. The sentence following the offending one clearly modifies and makes clear that: "The union has the exclusive right to speak on the behalf of graduate students when it comes to academic appointments and assignments could be determined in ways that are less adaptive to individual student needs." (U-13). The Hearing Examiner properly recognized that this sentence, and the rest of the answer to this FAQ, was lawful. Yet, the Hearing Examiner impermissibly took one sentence completely out of context and found it unlawful when it clearly conforms with PLRB precedent regarding direct dealing and what can happen with a union. Finally, the surrounding FAQs all discuss the bargaining process and include multiple statements that the University would bargain in good faith. (*See, e.g*, E-27) (In response to the question, "what is collective bargaining," the University responded, "during collective bargaining, representatives of a union and an employer meet, in good faith . . .;" In response to the question "what is bargaining in good faith?" the University responded, "bargaining in good faith means that each party considers the proposals submitted by each side. . ."). There is no suggestion of bargaining futility or of anything coercive. Thus, the Hearing Examiner's finding that this sentence is an unfair labor practice is clearly erroneous.

c. The Hearing Examiner's Conclusion that Posting this Sentence Online Significantly Impacted the Election is Erroneous as a Matter of Law

Just as in III(B)(2) *supra*, the Hearing Examiner's conclusion that the posting of this sentence online (i) did not allow the Union to respond; and (ii) meant that a substantial number of voters were likely affected, is contrary to established case law. As discussed above, the PLRB is not concerned about all election communications, but is wary of "misrepresentations

to . . . employee at the eleventh hour which will prevent a fair election by informed employees." *Unionville-Chadds Ford School District,* 3 PPER 178 (Nisi Decision and Order, 1973). Contrary to the Hearing Examiner's finding, an internet posting, which is only passively available leading up to and during an election, is not akin to a "twelfth hour communication." (PDO at 24). Voters did not re-receive this communication each day, in an email, text, letter or in person. To the contrary, this information was first posted more than 24 hours before the election, on a website that students were not required to visit, among more than 40 FAQ questions and answers, as part of a much longer answer to one of many questions about the impact of a union, so voters could remain blissfully unaware of this single sentence on the University' website. In fact, the record only demonstrates that a single voter even read this communication, much less that it impacted his vote. (Tr. 122-24, 130).

Thus, the conclusion that this single sentence on the University's website was widely read and that it affected the outcome of the election, is contrary to PLRB precedent regarding election communications.

D. The Hearing Examiner's Findings of Fact and Conclusions of Law Regarding an Email Sent by Dr. Little Must be Set Aside

The Hearing Examiner found that the following portion of an email from Dr. Little, the Chair of the Chemical Engineering Department to students in his department on the morning of the third day of the election, was an unfair labor practice under Section 1201(a)(1) of PERA because "it created the impression of close monitoring by the University" and warranted setting aside the election results:

> I just wanted to send you a note to encourage you to vote in the graduate student unionization election. The polling location is the O'Hara Student Center. I was actually a little surprised to see that only 81 students from the School of Engineering (whole school) have voted so far.

(PDO at 16-17). In so doing, the Hearing Examiner makes several unfounded findings of fact in regards to the nature and effect of Dr. Little's email, which must be overturned. His related conclusions that the email constituted unlawful surveillance is contrary to law , and must also be set aside.

1. The Hearing Examiner's Findings of Fact are Not Supported by Substantial Evidence in the Record

The Hearing Examiner wrongly draws several unreasonable inferences about Dr. Little's email to support his conclusion of an unfair practice, which are not supported by substantial evidence in the record. Essential to the Hearing Examiner's unfair practice conclusion, is his inference that the University was tracking voters by department during the election and sharing that information. (PDO at 17). However, the record is devoid of evidence to support such a finding. In fact, what the evidence shows is that the University used the list as permitted by the PLRB to assist the PLRB in confirming eligible voters and for purposes of challenging ballots if and where appropriate.[12] Ms. Hoogendoorn testified that she took the list each night, locked it in her office and picked it up the next morning and took it to the voting site. (Tr. 322). She further testified that she did not use the list to do any analysis on who had voted during the election. (*Id.*). Dr. Urban then testified that he never shared a list of names of students who had voted, either during or after the election. (Tr. 329-30). He also never provided data to faculty about the number of students in their programs who had voted in the election, either during or after the election. (Tr. 331). Nor did he ever provide such information to student leaders, like the president of the Engineering Graduate Student Organization. (Tr. 332).

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12 As noted in the PDO, the PLRB expressly permits the maintenance of a voter list and the Hearing Examiner correctly found that the University did not commit an unfair practice by following the PLRB processes. (PDO at 12-13).

In fact, the University's voter list kept by its observers did not even track student programs, just student names. (*Id.*; PLRB-6). There is no contrary evidence in the record and no evidence as to how Dr. Little came up with the number that he cited in the email, in fact.

The Hearing Examiner ignored the substantial testimonial evidence, and instead, impermissibly drew an unsubstantiated and unreasonable inference that the opposite of what the evidence established must be true, without any support. The Hearing Examiner concluded that, because 28 voters in the Chemical Engineering Department had not voted before Dr. Little sent his email, (Tr. 334-36), those 28 voters, plus the challenged ballots that are still outstanding "may have been enough to cause a material difference in the election if the challenged votes are included." (PDO at 30). The Hearing Examiner's determination that this email had a material effect on the election is not supported by substantial evidence in the record. To the contrary, this determination was based on unfounded conjecture and ignores the facts in the record. Initially, the Hearing Examiner's finding presumes, without any basis, that all 28 voters were so intimidated that they voted for no representative out of fear of reprisal. This conclusion has absolutely no foundation in the record.[13] There was testimony from a single student in the Chemical Engineering Department that she received the email (Tr. 222), but she did not testify that she read the email before voting or, in fact, at any other time. Nor was there any testimony

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[13] See also Section III(D)(ii), for a discussion on how the Hearing Examiner's finding that the content of the email constituted an unfair labor practice is contrary to the law, as it encouraged voters to make informed decisions and did not advocate for ***any*** position. In fact, the Hearing Examiner's findings are predicated on his assumption that Dr. Little must not have supported the University. There is absolutely nothing in the record to support that fact. For all we know, Dr. Little could have been in favor of unionization and his students may have known that which, following the Hearing Examiner's flawed logic, would have resulted in more votes for the Union. That assumption is equally as plausible as the one the Hearing Examiner reached **because there is no evidence in the record to support either.** Assumptions such as these cannot undergird a finding of fact. *R.P.*, 820 A.2d at 887 n.16; *Arctic Cat Sales, Inc.*, 110 A.3d at 249.

from any voter in the Chemical Engineering Department about the impact this email had on their decision about how to vote. Moreover, even if it impacted the votes of all 28 students in favor of the University – for which there is no evidence -- the Union still would have lost, because the Union lost the election by 37 votes. (PLRB-4).

To get around this obvious numbers problem in his results-driven reasoning, the Hearing Examiner then assumes that the uncanvassed challenged ballots could have included a sufficient number of voters who were influenced by the email to impact the outcome of the election. This assumption, however, is contrary to the actual facts in the record. After the votes were canvassed, the University and the Union stipulated that three ballots should be canvassed, 139 should not, and were unable to agree as to remaining 11 ballots. (PLRB-5). The three agreed-upon votes were never canvassed and the dispute over the remaining 11 ballots was not resolved because they are not of a sufficient number to impact the outcome of the election. (PLRB-5). The fact that these, at most, 14 ballots were never canvassed is irrelevant, however, because the record is clear that ***none*** of those ballots were from eligible voters in the Chemical Engineering Department. Specifically, in comparing the names on the three ballots who the parties agreed should be canvassed and the names on the eleven challenged ballots on which the parties could not reach an agreement (PLRB-5) to the list of graduate students in the Chemical Engineering Department (U-21), ***there is no overlap***. In other words, none of the potentially eligible challenged ballots were from voters in the Chemical Engineering Department who could have received Dr. Little's email. Any eligible voter in the Chemical Engineering Department who wanted to make her voice heard, was heard, and there is no evidence in the record that any voter opinions were changed as a result of the Dr. Little email, let alone that more than one student read Dr. Little's email.

The Hearing Examiner also references an email sent by the student head of the Engineering Graduate Student Organization around the same time suggesting that only 30% of eligible voters in the School of Engineering had voted, as somehow suggesting further nefarious dealings with the University without making such a finding. (PDO at 17). This suggestion is entirely improper as the email was sent by a student, not a representative of the University, and there is no evidence in the record as to how this student came up with the 30% number and, in fact, Dr. Urban testified that not only did he not communicate with the student about the number of students who had voted, he did not believe that number was accurate from his later review of the voter lists during the courts of the hearing. (Tr. 332, 335-36). The Hearing Examiner's reference to an email by a student to support University misconduct sets a dangerous precedent as there is no way an employer should be held liable for the statements or misstatements made by employees during the course of a campaign. Indeed, employees have a statutorily protected right to communicate with each other and make statements (even if they are not true and pulled out of thin air) during an election campaign. *Pennsylvania Social Service Union, Local 668 v. Montgomery County,* 43 PPER 62 (Proposed Decision and Order, 2011) (talking to coworkers about a union is protected activity under the law). To hold the employer accountable for such conduct not only is inconsistent with the purposes of the Act, but leaves employers in an impossible situation. Are they supposed to monitor speech? That could be an unfair practice. Are they supposed to stop inaccurate speech for fear of it being used against them? That could be an unfair practice for curbing protected activity. The Hearing Examiner ignores the Act and employee rights in using a student's protected activity against the University as support for a finding that the University engaged in unlawful conduct.

Thus, the Hearing Examiner's finding, based on speculation and assumptions, that Dr. Little's email could have impacted the outcome of the election is unsupported by, and in fact, contrary to, substantial evidence in the record and must be set aside.

2. The Hearing Examiner's Conclusions of Law Are Contrary to Established Precedent

The Hearing Examiner's conclusion that this email, in insolation, was an unfair labor practice, is contrary to well-established law. First, the Hearing Examiner failed to consider the communication in context. Second, the Hearing Examiner's finding that this was unlawful surveillance is not supported by the law.

a. The Hearing Examiner's Failure to Consider the Email in Context is Clearly Erroneous

The Hearing Examiner failed to consider Dr. Little's email in its entirety and in context, contrary to well established laws. *See Upper Merion,* 3 PPER 387 *supra.* As with the two previous communications that the Hearing Examiner wrongly found impermissible, the Hearing Examiner, once again, cherry picks one section of a communication and failed to consider it as a whole. Dr. Little's email was much longer than the one sentence with which the Hearing Examiner takes issue, which the Hearing Examiner conveniently overlooks. After urging people to vote, which is undoubtedly not objectionable, the email goes on to explain that the Engineering Graduate Student Organization had held a town hall to answer questions about the organizing campaign, and both the University and the Union were in attendance. (U-20). He then explained how questions were compiled and organized. (*Id.*). Finally, he attached a transcript of the town hall, along with a video to view the session to provide students with balanced resources from which to make a decision when they vote. (*Id.*; E-3, E-4). Frankly, it doesn't get more balanced than that.

Indeed, when the entire email is considered as a whole, the purposes of this communication is abundantly clear – Dr. Little simply wanted to encourage people to vote. Critically, he did not tell people how to vote, he merely advocated for making an informed decision. In fact, there is no evidence in the record of any prior statements or actions of Dr. Little that would indicate his personal preference as to the outcome of the election, if he harbored any. This underscores that the intent of his email was to advocate for voting, not any particular outcome. His email, which was balanced and neutral, did not imply students would receive any benefits for voting, or face reprisals for not voting, or for voting, a certain way. To the contrary, his email provided facts: (i) graduate students in receipt of the email were eligible to vote; (ii) the polls were still open; and (iii) voting was an important way to make sure their opinions were expressed, whatever they were. (U-20). Thus, both the purpose and effect of his email was unobjectionable. To penalize an employer or supervisor for encouraging employees to educate themselves and exercise their statutory rights as the Hearing Examiner did here is incomprehensible.

Moreover, in failing to consider the entire body of the communication, the Hearing Examiner also failed to consider the context of that communication, as he was required to do under long-standing precedent. As noted in Section III(B)(2), alleged misstatements must constitute substantial departures from the truth before the Board will find an unfair practice. (*Upper Merion* at 388.). As noted in *Conemaugh Valley Memorial Hospital* 2 PPER 116, vigorous campaigning is to be encouraged because it is the best way for employees to be informed and evaluate the positions of each side. Thus, vague or inartistically phrased messages, or even messages that depart from the truth, are not grounds for setting aside an election. Unless

the comments had a real, substantial impact on the election, the election should not be set aside. *See Upper Merion*, supra.

The Hearing Examiner failed to follow this well-established case law when he determined that Dr. Little's email was coercive surveillance. If he had properly applied the law to Dr. Little's email, the Hearing Examiner would have come to the opposite conclusion. Dr. Little's email, though perhaps inartistically worded (at worst), is not grounds for setting aside an election. To the extent his email was a push for graduate students to vote, his message was not a flagrant misrepresentation or part of overarching "campaign trickery." *Upper Merion* at 387. A reasonable voter – in this case a highly educated engineering graduate student – would have understood this communication as what it was – a get out the vote message, without feeling coerced to vote one way or the other.

Moreover, the Hearing Examiner ignored the evidence that the Union was attempting to track not only who voted but also how they voted and then publicizing those numbers. (Tr. 165.) One of the members of the Union's organizing committee told the Pitt News that the Union believed that it had 700 confirmed "yes" votes through the first three days of the election, and that number was published and available online while the election was on-going. (E-2). While that number was clearly inaccurate given the outcome of the election, the Union admitted that it was attempting to collect the names of who voted in its favor – something the University never tried to do. (Tr. 188). By then publishing these inaccurate numbers, the Union engaged in coercive communications that deceived eligible voters about the interim results of the election, as voters had no way to assess the accuracy of those numbers. There was also testimony that the Union was texting updates to eligible voters during the election. (Tr. 267). This context is important and ignored by the Hearing Examiner here, despite his finding

elsewhere that the Union had the ability to communicate with eligible voters up to and during the election (Finding of Fact 51), and the record evidence cited here and in Section III(B)(i)(3) above demonstrating that the Union did just that.

Accordingly, the Hearing Examiner's finding that Dr. Little's email was an unfair labor practice warranting setting aside the election results is contrary to well established law.

b. The Hearing Examiner's Conclusion that the Email was Coercive Surveillance is Clearly Erroneous

The Hearing Examiner's conclusion that Dr. Little's email was coercive is clearly erroneous for a number of reasons.

First, the Hearing Examiner takes issue with the small portion of the email that references how many voters in the School of Engineering had voted. Interestingly, however, the Union challenged not only Dr. Little's email but also the University's maintenance of the list of who voted. (ULP Allegations No. 2 and No. 3). The Hearing Examiner correctly found that PLRB law, unlike the NLRB, permits parties to an election to maintain a list of who voted and that it is common for both parties to do so. (PDO at 13). The Hearing Examiner's conclusion that the University could not use the list to communicate with voters, even to urge people to vote – "The problem is not that the University kept a list; the unfair practice is what the University did with that information" (PDO at 17) – is wholly unsupported by the law and contrary to the PLRB law that allows the keeping of a voter list. *Centre County*, 11 PPER ¶ 11050 (Decision and Order, 1980) (affirming long-standing PLRB policy of allowing poll watchers to keep a running tally of the number and names of voters during an election, contrary to NLRB policy). As the Hearing Examiner noted, the PLRB has never held that the list cannot be used for communications. (PDO at 17) ("While a review of Board cases does not show any cases with these exact facts…."). There is no reason for such an unwarranted expansion of PLRB case law

here and the Hearing Examiner's conclusion that the University is not permitted to use a list that it is lawfully allowed to keep is illogical.[14] As discussed above, the PLRB has held that knowing who voted, as opposed to how they voted, is not coercive as a matter of PLRB law. Thus, a sentence in an email that cites to the number of people who voted (with no names or insinuation on how people voted or that management would know that information), cannot as a matter of law be coercive.

Second, the Hearing Examiner misinterpreted PLRB and NLRB caselaw regarding election surveillance in concluding that Mr. Little's email created the impression of University surveillance. The PLRB will find an employer in violation of Section 1201(a)(1) of PERA if it surveils employes engaged in organizational activity. *Western Pennsylvania Hospital*, 3 PPER 221 (Nisi Decisions and Order, 1973). A review of the cases cited by the Hearing Examiner, however, demonstrates that the PLRB focuses on the physical presence of supervisors and managers in the polling place and the PLRB has never found that an email like this one is unlawful surveillance, as the Hearing Examiner concedes. (PDO at 17).

The Hearing Examiner cites *McKeeport Area School District*, 3 PPER 48 (Board Order, 1972) for the idea that the presence of a supervisor within the polling area might intimidate voting participants and destroy laboratory conditions essential for elections. That case is wholly inapplicable. Here, Dr. Little never entered the polling area.[15] Indeed, rather than

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[14] It should be noted that there is absolutely no evidence in the record that the University actually used the list in the fashion inferred by the Hearing Examiner. See Section III(D)(i), *supra*. However, even assuming *arguendo*, that it did, that is not unlawful under PLRB precedent.

[15] The only University representatives who entered the polling area were the University's approved election watchers. The Hearing Examiner found, based on substantial evidence in the record, that those watchers were not "closely associated with management," specifically because none of the watchers were known or recognized by the Union's watchers, or any eligible voter. (PDO at 13). The Hearing Examiner also noted that none

approach the polling area, Dr. Little did something much more indirect and harmless: he sent an email to students in the Chemical Engineering Department. Email, unlike engaging with eligible voters in conversation in person, let alone in the polling place, is passive. Students could individually decide to ignore it or open it whenever they wanted, and they were not expected to respond in the presence of a supervisor or at all. *See 1621 Route 22 W. Operating Co. LLC v. NLRB*, 725 F. App'x 129, 140 (3d Cir. 2018). Electronic communications such as emails and text messages have been found voluntary and non-coercive, even during the 24-hour period before an election, because voters can choose to ignore it, unlike being required to attend a mandatory meeting. *(Id.)*. Here, eligible voters had the choice to ignore the Dr. Little email, and there is no evidence that even a single eligible voter read it during the election. Accordingly, unlike *McKeesport*, eligible voters were not forced to (i) react to the email; (ii) discuss the email; or, (iii) respond to the email, either in the presence of a manager, and while in the polling area. All of the foregoing greatly diminishes any notion of surveillance of eligible voters by Dr. Little during the election, and demonstrates the inapplicability of the Hearing Examiner's case cites.

Third, the Hearing Examiner's reliance on NLRB case law on surveillance during an election is nonsensical as it comes after the Hearing Examiner correctly concluded that the PLRB does not follow NLRB cases regarding parties tracking who votes during an election. (*Compare* PDO at 17 (applying NLRB caselaw regarding surveillance) *with* PDO at 12 (refusing to apply NLRB caselaw regarding voter lists)).

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of the watchers participated in forming any policies with respect to graduate students. (PDO at 16). As such, the only people associated with University in the polling area were not people who the eligible voters would have associated with University management, so there was absolutely no impression of surveillance by the University in the polling area itself as the Hearing Examiner correctly found.

Fourth, even if reliance on NLRB surveillance case law were proper here, the Hearing Examiner does not actually follow it. The Hearing Examiner cites both *United Charter Services*, 306 NLRB 150 (1992) and *Tres Estrellas de Oro*, 329 NLRB 50 (1999) for the analytical test for determining whether an employer has created the impression of surveillance. But, after citing the test, the Hearing Examiner fails to apply it to the instant case. If he had done so, he would have concluded that Dr. Little's email did not rise to the level of surveillance as prohibited by the NLRB.

As the Hearing Examiner found, "the test for determining whether an employer has created an impression of surveillance is whether the employee would reasonable assume from the statement in question that his union activities had been placed under surveillance." (PDO at 18). In applying this test," a relevant consideration is whether the employer's statement reveals detailed knowledge of specific activities." *United Charter Service*, 306 NLRB 150, 151 (1992). Where the employer's statement merely indicates a general awareness of union activities, but does not show knowledge of who was participating, when, or what was said, employees would not reasonably assume their union activities were under surveillance. *Nat'l Hot Rod Ass'n & Int'l Alliance of Theatrical Stage*, 2019 NLRB LEXIS 432, *9-10; *see also Waste Management of Arizona*, 345 NLRB 1339, 1339-1340 (2005) (finding a supervisor did not create the impression of surveillance where he said that "he knew that employees had held a union meeting" but did not indicate that he had had detailed knowledge about the meeting, and there were otherwise "various other ways in which he might have learned of the non-secret meeting.").

Dr. Little's email is akin to the supervisors' communications in *National Hot Rod Association* and *Waste Management of Arizona*, which the Hearing Examiner inexplicably

ignores. First, Dr. Little did not know *who* had voted and nothing about his email suggested otherwise. Second, he did not know *when* graduate students had voted over the preceding two days of voting and nothing about his email suggested otherwise. Third, he did not know *how* voters had voted and noting about his email suggested otherwise. Rather, all his email suggested is that he knew based on the total number of votes, not every eligible voter from the entire School of Engineering had voted. It does not even suggest that he knew how many students in the Chemical Engineering Department had voted. Nor was it targeted at specific students or followed up by any other communication. It was a single get out the vote email. This does not demonstrate a sufficiently detailed knowledge about graduate student organizing activities to rise to the level of unlawful employer surveillance. Moreover, there is no evidence in the record regarding where Dr. Little obtained this information, because Dr. Urban testified that he never shared those numbers with faculty during the election (Tr. 329-31) and the Union offered no evidence as to where the information came from. In failing to apply NLRB standards, which he himself cited, the Hearing Examiner erred as a matter of law.

Finally, the Hearing Examiner also ignored NLRB decisions demonstrating that much more blatant supervisor activity in the midst of an election does not rise to the level of employer surveillance. For example, the continued presence by an employer representative outside the polling place will not always constitute objectionable surveillance. *J.P. Mascaro and Sons*, 345 NLRB 637, 639 (2005); *Station Operators, Inc.*, 307 N.L.R.B. 263, 263 (1992). If such obvious employer presence in the vicinity of the polling area does not constitute unlawful surveillance, Dr. Little's email which was sent once, which no students were required to read, and which there is no evidence that any voters actually did read before voting, certainly does not either.

The Hearing Examiner's results-based conclusion that a single reference by one faculty member that he was surprised by the number of students in the entire school of engineering who had voted so far ignores well established law and is clearly erroneous and must be set aside.

E. The Hearing Examiner's Conclusions Regarding the Remedy for the Alleged Unfair Labor Practices are Contrary to Established Precedent and Board Policy

1. Setting Aside an Election is an Extreme Remedy and the Board Will Only Do So in Limited Circumstances Which Are Not Present Here.

The Hearing Examiner's order of a new election is contrary to established precedent and PLRB policy. Section 1101.605 of PERA governs representation elections. 43 P.S. § 1101.605. Subsection 6 provides, in relevant part: "If the board determines that the outcome of the election was affected by the 'unfair practice' charged or for any other 'unfair practice' it may deem existed, it shall require corrective action and order a new election. If the board determines that no unfair practice existed or if it existed, did not affect the outcome of the election, it shall immediately certify the election results." 43 P.S. § 1101.605(6). That is the ***only*** basis the statute provides for setting aside election results.

Therefore, setting aside an election is only appropriate if there was an unfair practice and that same practice affected the election results. Not surprisingly, the PLRB and Pennsylvania courts have applied a high bar when determining whether there has been a material effect on the election and have refused to set aside elections simply because there was an alleged failure to maintain laboratory conditions, which is the case here.

For example, in an Amended Order Dismissing the Employer's Objections to the Conduct of an Election involving Montgomery County, the Hearing Examiner cited to *Kaolin Mushroom Farms, Inc. v PLRB*, 702 A.2d 1110, 1116 (Pa. Commw. Ct. 1997), noting that

laboratory conditions are an ideal to be strived for, but it is "probably not possible to completely achieve such ideal conditions, and elections will not automatically be voided whenever they fall short of that standard." *Montgomery County*, 30 PPER 30074 (Amended Order Dismissing the Employer's Objections to the Conduct of an Election, 1999). Rather, the concept of laboratory conditions must be "realistically applied," and it is in the Board's "broad discretion" to determine whether the election environment allowed employees to "exercise free choice." (*Id.*). On appeal, the PLRB affirmed that standard, noting that:

> The so-called 'laboratory conditions' standard is an abstract concept which must be applied in a practical manner; in this respect it is more of a theoretical objective than a definitive legal standard. The mere fact that the election conditions were less than ideal is not, by itself, a sufficient basis for setting aside the election results altogether. The party challenging the representation election must establish a causal relationship that the irregularities materially affected the results of the election.

Montgomery County, 30 PPER 30137. This was affirmed yet again by the Commonwealth Court. *Montgomery County v. Pennsylvania Labor Rels. Bd.*, 769 A.2d 554 (Pa. Commw. Ct. 2001). The court specifically noted that the objecting party, Montgomery County in that case, established various improprieties occurred, but "failed to produce any evidence that these improprieties interfered with the employees' exercise of free choice." *Id.* at *11. Here, there is no evidence that any of the unfair practices found by the Hearing Examiner materially interfered with employees' free choice. Instead, the Hearing Examiner picked out a sentence from thousands, a chart, nearly identical to others found lawful, and an email to a small group of students encouraging them to vote. None of this conduct was unlawful, let alone of the type that should warrant setting aside an election. When coupled with the Hearing Examiner's finding that the Union had the opportunity to communicate with students through the election, these

three things, even if they were objectionable, render the laboratory conditions less than ideal at worst. As noted above, that is not a basis for setting aside the election.

The Hearing Examiner also ignored case law which demonstrates more egregious behavior did not warrant setting aside an election. For example, the Hearing Examiner cited *Philadelphia Joint Board*, 41 PPER 55 (Final Order, 2010) as demonstrative of the burden shifting standard, discussed in Section III(F) below, but did not mention the facts of the case. This is because, even using the *Western Psychiatric* standard, the election in *Philadelphia Joint Board* ***was upheld***. The rival union alleged that the other union held "ballot parties," during which union representatives assisted voters in completing their mail in ballots. However, the rival union was unable to prove who attended these parties, or who organized them. The PLRB found that even if the rival union would have proven that the union held such "ballot parties," they did not significantly affect the outcome of the election. This case underscores the reality that the PLRB and Pennsylvania courts do not set aside elections lightly, and only do so where the charging party has proven both that an unfair practice occurred and that the practice materially affected the results of the election.

Not ordering a new election also comports with the important Board policy of promoting finality. To set aside an election on less than adequate grounds would enable a losing party to routinely seek a second chance to convince employees of their mistake. Such a policy might well lead to repeated attempts to impeach the results of an election. *Zeiglers v. Refuse Collectors Inc. v. NLRB*, 639 F.2d 1000 (3d Cir. 1981). The Board should not countenance such an attempt, and the precedent the Hearing Examiner set will allow elections to be overturned with ease.

Finally, the Hearing Examiner contravened the interests of predictability and maintaining trust in the PLRB when he ordered a new election. Concern for public interest requires that the Board balance the clarity and relative predictability of holding every act to be an unfair labor practice against the finality of representation elections, promptness of certifications, the rights of those who have already cast their ballots, and the visibility of the Board's procedures. *Woodland Hills School District, supra.*

In that same vein, the Hearing Examiner ignores the slippery slope that his PDO creates. In his PDO, the Hearing Examiner found that the chart and sentence were more coercive and deprived the Union of an opportunity to respond solely because they were posted online. With this conclusion, the Hearing Examiner is creating a dangerous precedent. By extension, in any future case involving allegedly coercive communications in the election context, if the communication is posted on the internet, it will be an unfair labor practice. This cannot be the standard for overturning elections in a world where communications are largely instantaneous, and take place via email, text and social media. If the complaining party need only to show that a single, disputed communication was posted online in order to prove it was coercive, no election results would ever be certified. This would undermine promote the PLRB's goals of finality, predictability, and trust in the process. Accordingly, the decision to order a new election is clearly erroneous and contrary to PLRB policy and should be set aside.

2. The Hearing Examiner Contravened Existing Case Law By Ordering a New Election Based on the Three Alleged Unfair Practices.

In concluding that a new election was warranted, the Hearing Examiner contravened established precedent, which requires the Hearing Examiner to consider the context of election communications, and whether the opposing party had the opportunity to address them, before overturning election results. *Neshaminy School District*; *Erie County Technical*

School; *Millcreek Township*, *supra.* As discussed in Section III(B)(ii) above, part of this analysis necessarily entails a consideration of the "rights of the parties to express themselves on the issues," because the Board has no desire to "become a censor of non-coercive campaign propaganda." *Upper Merion*, 3 PPER 388. Rather than pick apart each communication on an individual level, the Board will "leave that task to the common sense and intelligence of the voters." (*Id.*). And here, we are dealing with very intelligent voters.

Any hint of coercion in the University's election communications that the Hearing Examiner found improper in U-11, U-13 and U-20 was entirely diminished by the overarching context in which those communications were made. One of these communications was a single sentence in a portion of a response to over 40 FAQs on the University's website. The other was a chart on another page on that site. The University's website was hyper-linked in emails, but the text the Hearing Examiner finds objectionable itself **was never sent directly to students.** Students had to seek out the website itself and then, if they did so, find the few lines the Hearing Examiner found objectionable among the thousands of lines of text. In fact, the FAQ itself runs more than 12 pages with 40 questions and answers. (E-27). The one sentence that the Hearing Examiner found objectionable is found on page 6, within a much larger answer, the rest of which the Hearing Examiner properly found was permissible. (*Id.).* Similarly, the chart the Hearing Examiner objects to came amidst statements about collective bargaining with which the Hearing Examiner did not take issue and mirrored numerous other statements on the issue of what can be bargained that the Hearing Examiner found proper. (PDO at 26, 28; U-6, U-12, U-16).

Critically, students were not required to view any of these materials and there is no evidence in the record that more than one voter ever did, nor that any voter read any of these sentences out of context like the Hearing Examiner. (Tr. 122-23, 130). That alone undermines

any finding that these communications were sufficient to warrant setting aside the election. Cf. *1621 Route 22 W. Operating Co. LLC,* 725 F. App'x 129. If an email to voters is not enough (as the Hearing Examiner found), a posting on a website that there is no evidence more than one voter ever saw surely is not.

U-20 (Dr. Little email) was an email to only a small number of students in a single department which there is no evidence that any eligible voter read before voting. *See* Section III(D)(i) above. In fact, it could not have affected the election results, which alone warrants setting aside the Hearing Examiner's conclusion regarding that communication. *Id.* Moreover, it was not the only email that students received about the election. The University sent approximately 50-60 emails leading up to and during the election, none of which have been found to be an unfair labor practice. (Tr. 338-39, 363, 432-33) (Dr. Urban testifying to the number of emails); (U-4, U-7, U-8, U-9, U-10, E-12, E-13, E-14, E-15, E-16, E-17, E-19, E-20, E-21, E-22, E-23)(unchallenged emails); (U-3, U-5, U-6, U-18) (emails found to be lawful by the Hearing Examiner).

Finally, there is overwhelming evidence in the record that these communications were made in the context of student questions, either at town halls, via the anonymous portal, or via face-to-face meetings and emails with Dr. Urban. (Tr. 342-44, 350, 359-60). The Hearing Examiner ignored his mandate to consider this overarching adversarial union organizing context when he determined that a new election was the proper remedy.

The Hearing Examiner's conclusion that the Union did not have an opportunity to respond to U-11 and 13 solely because they were posted online is contrary to the record and PLRB case law regarding when and if a charging party has the opportunity to address the responding party's communications. As noted above in Section III(B)(ii)(3), PLRB case law

makes clear that where the charging party has four days (if not more) to respond to a communication, that can remedy any sense of coercion in that communication. *See e.g. Upper Merion*, 3 PPER 387. Although the record does not demonstrate when exactly U-11 and U-13 were added the University' webpage, the website was created as soon as the election was announced, and was maintained throughout the election. (Tr. 408). Given that the Union was communicating with voters up to and through the election (Tr. 165, 187) -- as the Hearing Examiner found (Finding of Fact 51) -- it clearly had an opportunity to address any statements on the website, had it desired to do so. In fact, the record makes clear that the Union did respond to University communications on various occasions, by handing out written information after a University town hall, speaking at school specific events at the School of Engineering, and the School of Computing Information, and posting on social media. (Tr. 382-85, 385-86, 391-92, 404, 412).

Moreover, the University sent out communications with similar language via email before the election, but the Hearing Examiner did not find that those communications deprived the Union of time to respond. For example, the email at U-6 was sent on April 4, 2019, and the Hearing Examiner recognized that if the Union had found that comparable language to be objectionable, it could have communicated as much in the two weeks that remained until the election. Given that the Union had the opportunity to address comparable language in other communications, the notion that the Union did not have an opportunity to address the online language is baseless.

As noted in Section III(B)(i)(2), above, the mere fact that these statements were posted online does not make them more coercive. Rather, by posting on a website, students were required to actively navigate to the site, and then choose the page and FAQ that they desired, out

of a several webpages, and scores of FAQs. Electronic communications have been found to be passive, voluntary and non-coercive, even during the 24-hour period before an election, because voters can ignore them, and the same is true for the University's website, as there was no requirement that students visit or read the indicated pages. (*I1621 Route 22 W. Operating Co. LLC,* 725 F. App'x at 140). The voters' ability to ignore these online postings proves that they were not more coercive online – if anything, they were less coercive. Thus, the Hearing Examiner's decision that a new election was a proper remedy is contrary to PLRB precedent regarding when a new election is warranted based on coercive election communications.

F. The Hearing Examiner Shift of the Burden to the University to Prove the Communications Did Not Impact the Election is Contrary to Established Precedent and Board Policy

The Hearing Examiner held that once the Union established that the University committed unfair labor practices, which the University disputes for the reasons stated above, the burden shifts to the University to prove that the conduct did not materially affect the outcome of the election, citing *Western Psychiatric* and *Philadelphia Joint Board*, 41 PPER 55 (Final Order, 2010).

This burden shifting, which would require the University to prove a negative, is contrary to Commonwealth Court decisions, PERA itself, and policy. In *Kaolin*, the employer filed unfair labor practices charges against CATA (the union), which were consolidated with its objections to the PLRB's conduct of the election, just as the objections and ULP charge have been consolidated here. *Kaolin Mushroom Farms, Inc.* 702 A.2d at 1114. The Board previously found that the union and CATA (Comite de Apoyo a los Trabajadores Agricolas, or, Farmworkers Support Committee) were affiliated, and thus the actions of one could be imputed to the other. *Id.* at 1125. On appeal, the Commonwealth Court agreed with the Board that the

alleged unfair labor practices did not have a material impact upon the election, **without shifting the burden to the union to make such a showing**, and so refused to order a new election. (*Id.*)

In addition, *Kaolin* relies on federal court cases that include allegations of coercive communications[16] and the use of an improper watcher,[17] just like the allegations made by the Union here, yet the burden never shifted to the offending party to prove a negative in those cases.[18] 702 A.2d 1110. To the contrary, the federal courts in those cases described the burden on the objecting party as a "heavy one" requiring "the objecting party to show by specific evidence not only that improprieties occurred, but also that they interfered with employees' exercise of free choice to such an extent that they materially affected the election results[,]"

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16 *Beaird-Poulan Div. Emerson Electric Co. v. NLRB*, 649 F.2d 589, 591 (8th Cir. 1981) (where employer filed objections alleging, *inter alia*, that union engaged in coercive and misleading communications, the Eighth Circuit stated that "it is axiomatic that representation elections are not to be set aside lightly. The burden of showing grounds for doing so is on the party seeking to overturn the election. And that burden is a heavy one, requiring the objecting party to show by specific evidence not only that improprieties occurred, but also that they interfered with employees' exercise of free choice to such an extent that they materially affected the election results.")

17 *NLRB v. Black Bull Carting*, 29 F.3d 44, 45 (2nd Cir. 1994) (where the employer filed objections seeking to overturn the election because the union used a union official as a watcher, the Second Circuit stated, "a party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden. The presence of such an irregularity is not in itself sufficient to overturn an election. Nor is it sufficient for a party to show merely a possibility that the election was unfair. Rather, the challenger must come forward with evidence of actual prejudice resulting from the challenged circumstances.").

18 Under the NLRA, any challenges to any objectionable conduct by anyone (the NLRB, the other party or a third party) that takes place on or after the date of filing a petition for representation and is alleged to impact the outcome of the election may be filed as post-election objections, unlike the PLRB which distinguishes between election objections (to the conduct by the PLRB) and unfair labor practice charges (to actions by the other party). (29 CFR § 102.69; NLRB Case Handling Manual §§ 11392.1, 11392.2(a)(1)). Once filed, the burden to support post-election objections "rests solely on the party making them." (*Id.* at § 11392.10). As evidenced by the cases cited above, the objecting party must show not only was there improper conduct but also evidence of actual prejudice resulting from that conduct.

Beaird-Poulan, 649 F.2d at 591, and required evidence of "actual prejudice" resulting from the challenged conduct. *Black Bull Carting*, 29 F.3d at 45. The same standard should apply here, as it did in *Kaolin*.

Requiring the Union to prove both that there was improper conduct and that it materially affected the outcome of the election under the totality of the circumstances is also consistent with Section 605(6) of PERA which allows elections to be set aside only if "the board determines that the outcome of the election was affected by the 'unfair practice' charged or for any other 'unfair practice' it may deem existed" and makes no reference to shifting the burden to the charged party to prove a negative. 43 P.S. § 1101.605(6). The Hearing Examiner's use of a standard that shifts the burden runs afoul of PERA.

Finally, requiring the charging party to prove the impact of the conduct alleged is consistent with Board policy and common sense. The charging party is the one with the information on the conduct it alleges to have occurred. If it did not have information to suggest that the complained-of actions had a negative impact on the outcome of the election, there would be no basis for its charges. Requiring it to prove those allegations, rather than asking the charged party to prove a negative – that there was no impact – is consistent with the Board policy in favor of finality and trust in the process, as well as preservation of the considerable Board resources that elections consume, particularly one as large as this one. Indeed, under the Hearing Examiner's PDO, parties can now file an unfair practice, regardless of whether they know or think it affected the election, and if the conduct is proven, the other party then has to prove a negative, which can be virtually impossible. This would lead to countless elections being set aside when the losing party finds some scintilla of objectionable conduct. That is wholly inconsistent with PERA and the case law.

Accordingly, the Board should find that shifting the burden to the University to prove that the alleged unfair practices did not impact the outcome of the election was improper. Since there is no evidence that these alleged unfair labor practices did, in fact, affect the election results, the Hearing Examiner's findings to the contrary should be set aside, the unfair labor practice charge should be dismissed and the election results immediately certified in accordance with Section 605(6) of PERA.

G. The Hearing Examiner Erred in Finding the University Did Not Meet its Burden under the Burden-Shifting Test

Even if the Board were to agree with the Hearing Examiner that the Union met its burden under the first prong of the shifting burden test of *Western Psychiatric*, the University has uncontrovertibly established, through examination of witnesses and documentary evidence, that its communications had no effect on the outcome of the election. Namely:

- PLRB agent Mr. Bachy testified that he never saw a voter that looked intimidated or threatened (Tr. 38, 40, 62);
- In the end, the voter turnout rate was 70%, a very high voter turnout rate (Tr. 44);
- In the weeks leading up the election, there were numerous, robust exchanges between the University and the Union, wherein all parties had the opportunity to present their views (Tr. 382-85, 385-86, 391-92, 404, 412);
- The University consistently provided the Union sufficient time to respond to any of its communications, the Union was communicating with voters up to and through the election, and the Union regularly responded to University communications (Tr. 165, 187);
- The record contains no evidence that any voters other than a single Union witness (Casey Madden) even viewed the website, much less the portions of the website

communications the Hearing Examiner finds problematic (Tr. 122-24, 130) (Madden testified as to how the FAQs worked but did not specifically testify to viewing U-11 or U-13);

- The record contains no evidence that even Madden's vote was influenced by those statements, which seems unlikely since he was a union election watcher, much less that they impacted any other eligible voter (Tr. 98).
- The record contains evidence that only a single voter in Chemical Engineering (Emily Ackerman), actually viewed the email from Dr. Little (Tr. at 221);
- There is no evidence in the record that Ackerman read the email before she voted or that it influenced her vote, which seems unlikely since she describes herself as being on the union organizing committee much less that it influenced the vote of any of the other students who whom it was sent (E-4 at 22);
- The number of eligible voters to whom Dr. Little's email was sent is not sufficient to change the outcome of the election in any event (*see* Section III(D)(i) above); and
- All the watchers, both for the University and for the Union, confirmed that they never saw an eligible voter leave without voting. (Tr. 135, 161, 176, 215, 277-78, 297, 306, 311).

Thus, the record establishes that the complained of communications, even if found to be unlawful, had no material effect on the election under the very high standard imposed by the PLRB. *Accord Susquehanna County*, 31 PPER 129 (Final Order, 2000); *Philadelphia Joint Board*, 41 PPER 55 (Final Order, 2010); *Dycora Transitional Health--Fresno, LLC* , NLRB LEXIS 149, *65 (2019); (*Fessler & Bowman, Inc.*, 341 N.L.R.B. 932 (2004) (even where objectionable conduct was established, election would only be set aside

CERTIFICATE OF SERVICE

I, Meredith S. Dante, hereby certify that on this date, I served by First Class U.S. Mail, postage prepaid, and via Federal Express, a true and correct copy of the foregoing Brief of the University of Pittsburgh in Support of its Exceptions to the Proposed Decision and Order upon the following:

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